2000) (that successful candidate was better qualified with respect to three of the four criteria listed in the position application constituted legitimate non-discriminatory reason).

Plaintiff first attempts to establish pretext with respect to Defendants' assertion that Plaintiff was not hired for the position because she did not possess as many of the preferred qualifications as the successful candidate. Specifically, Plaintiff argues that her lesser qualifications were not the real reason for the decision because the preferred qualifications are not relevant to the position in question. Plaintiff argues that the actual relevant qualification for the position is experience in performing the functions listed in the job posting and that she, rather than the successful candidate, has that experience. However, Defendants are entitled to determine which qualifications are most desirable in a candidate for a particular position and it is not the job of this *Court* to second-guess those business decisions. *Denney*, 247 F.3d at 1186 n.8. The preferred qualifications – a bachelor's degree in finance, management, or accounting; Excel experience; construction industry experience; and good oral and written communication skills – are directly relevant to the performance of the position at issue, which involved the management of cash flow for Defendants' growing construction company. *See* Fuller Dep. at 106-07. That Plaintiff has experience in relevant job functions does not establish that Defendants' desire to hire a candidate who possessed more of the qualifications they deemed relevant does not indicate a discriminatory intent and thus does not constitute evidence of pretext. *Denney*, 247 F.3d at 1185 (holding that plaintiffs failed to establish pretext where they completely failed to show discriminatory intent in the

selection of specific subjective criteria or in the choice to focus on those criteria).

Plaintiff also attempts to establish pretext with respect to Defendants' assertion that Fuller, the hiring manager, believed that the successful candidate was better prepared than Plaintiff to move into the position without extensive supervision or training. Specifically, Plaintiff argues that she had performed the job functions relevant to the position at issue for almost two years at the time the position was filled and that the successful candidate did not have comparable experience. Plaintiff points to evidence that Fuller believed that the successful candidate would need to learn more about the job, that the successful candidate's degree did not provide her with any information about the SCES programs which Plaintiff believed were necessary to the position, that the successful candidate had limited construction industry experience, and that Plaintiff had more experience with a specific software application. Plaintiff also points to evidence that she had a better interview than the successful candidate.

Again, however, this evidence is insufficient to establish that Defendants did not believe that the successful candidate could move into the position with less supervision than Plaintiff, and thus is insufficient to establish pretext. Fuller testified that McFall, the successful candidate, only needed to learn more about the specific mechanics of the unit's business and its unregulated aspects. Fuller Dep. at 119-20. While McFall's experience in the construction industry may have been limited, Plaintiff points to no evidence that she herself had any such experience. That Plaintiff may have performed better in the interview does not establish that Fuller could not have believed that McFall was actually more qualified, especially

because there is no evidence that interview performance was considered a significant measure of an applicant's need for supervision. Plaintiff's opinion that she would need less supervision because she had more experience with software programs and systems she considered important does not constitute evidence that Fuller did not believe McFall in fact would need less supervision than Plaintiff. In short, Plaintiff offers little evidence other than her own opinion that she would need less supervision or training than the successful.

The proper pretext analysis is whether Plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (internal quotation mark and citations omitted). Defendants are certainly familiar with their own labor needs and are entitled to determine whether certain qualifications make a candidate more suitable for a particular position. *Murphy v. Yellow Freight System. Inc.*, 832 F. Supp. 1543, 1548 (N.D.Ga. 1993) ("The use of subjective factors in making employment decisions cannot be sufficient to support a finding of discrimination."). Plaintiff contends that the subjective reasons asserted are not credible based on evidence in the record. However, while the evidence Plaintiff offers suggests that the successful candidate required some training in the position, Plaintiff has not come forward with any evidence to establish that the decision makers with respect to this position did not actually find that the successful candidate would require less supervision than Plaintiff. Further, even if Plaintiff could establish that her experience made

her more qualified, "in a failure to promote case, a plaintiff cannot prove pretext by simply showing that she was better qualified than the individual who received the position that she wanted. . . . Disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face." *Denney*, 247 F.3d at 1187 (internal quotation marks and citations omitted). In this case, it cannot be said that the juxtaposition of Plaintiff's experience in performing relevant job functions and the successful candidate's possession of the stated preferred qualifications for the positions meet that standard. Plaintiff's evidence is thus insufficient to permit a reasonable fact-finder to conclude that the reasons given by Defendants were a pretext for intentional discrimination.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' hiring and promotion practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' hiring and promotion practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the promotion of black employees relative to white employees, are evidence from which a reasonable fact finder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices . . .

such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n. 19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support her individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to hiring decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions, or outcomes for those employees, both black and white, who had actually applied for posted positions challenged by Plaintiff. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations in which she worked or the positions which she challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment.

See Brown v. American Honda Corp., 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[4] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).

Because Plaintiff has failed to establish pretext with respect to all of Defendants' asserted reasons, Defendants are entitled to summary judgment with respect to this position. *See Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000); *Combs*, 106 F.3d at 1529.

In the motion for summary judgment, Defendants argue that Plaintiff cannot establish a prima facie case of promotion discrimination with respect to two positions which were not specifically raised in the complaint but which Plaintiff mentioned during discovery: a Support Representative Marketing position in November 1998 and a Customer Service Section Supervisor in 1999. Plaintiff

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[4] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

does not respond to these arguments and thus is deemed to have abandoned any claims with respect to these positions.

Accordingly, Defendants are entitled to summary judgment with respect to Plaintiff's promotion discrimination claims.

Compensation Discrimination

Defendants first argue that this claim is barred by the statute of limitations because Plaintiff became aware of the allegedly discriminatory acts outside the statutory period. "Claims of discrimination accrue when the plaintiff is informed of the discriminatory act." *Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir. 1998). Defendants contend that Plaintiff should have filed her claim by February 2000, based on Plaintiff's testimony that she first began to believe that she was discriminated against with respect to pay during February 1998. Pla. Dep. II at 188. In response, Plaintiff contends that her claim is not barred because compensation discrimination constitutes a continuing violation bringing her claim within the statute of limitations. The Court of Appeals for the Eleventh Circuit has held that "race based, discriminatory wage payments constitute a continuing violation of Title VII." *Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 449 (11th Cir. 1993); *see also Bazemore v. Friday*, 478 U.S. 385, 395, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986). Because Plaintiff remains employed by Defendants and apparently contends that the alleged compensation discrimination continues, her claim is timely.

To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four

elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (applying the test in an age discrimination case).[6] Defendants do not dispute that Plaintiff is a member of a protected class or that she received lower wages than her alleged comparators but argue that they are entitled to summary judgment on this claim because Plaintiff has failed to establish that she was similarly situated to any of her white co-workers who received higher pay.

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[6] Plaintiff contends that to establish a prima facie case of compensation discrimination, she is only required to show that she was treated unfairly with respect to compensation and that Defendants operated with an improper intent. Plaintiff relies on the holding in *County of Washington v. Gunther*, 452 U.S. 161, 68 L. Ed. 2d 751, 101 S. Ct. 2242 (1981) to support her proposition that "claims for . . . wage discrimination can be brought under Title VII even though no member of the [non-protected group) holds an equal but higher paying job." Pla. Resp. To Def. Hot. S.J. at 2 (citing *Gunther*, 452 U.S. at 168). In *Gunther*, the Supreme Court determined that a female plaintiff was not required to meet the equal work standard to bring a sex discrimination claim under Title VII. The Court expressly noted that the issue before it was not whether the plaintiff could state a prima facie case under Title VII without such evidence. *Gunther*, 452 U.S. at 168 n.8. Plaintiff also cites *E.E.O.C. v. Reichhold Chems., Inc.*, 988 F.2d 1564, 1570 (11th Cir. 1993), in which the Eleventh Circuit acknowledged the Supreme Court's holding in *Gunther* that "a Title VII plaintiff could prevail if she could prove unfair treatment and an intent to discriminate." *Id.* However, the Eleventh Circuit did not find that the holding eliminated the requirement that Plaintiff show that she was paid less than a co-worker who was similarly situated but only that Title VII affords a less stringent standard as to similarity than the Equal Pay Act. *Id.* In any case, as discussed below, Plaintiff has failed to show that she was treated unfairly or that Defendants set Plaintiff's compensation with an improper intent.

In the complaint, Plaintiff asserts that her base salary was lower than three white employees holding the same "Project Analyst" title as Plaintiff – Dena Faessel, Kathy Robb, and Jimmy Allen – and three white employees holding titles lower than Plaintiff's – Marianne Mitchell Ellis, Reba Jones, and Barbara Stokes. Defendants contend that Plaintiff cannot establish a prima facie case because she cannot establish that she performs functions similar to her alleged comparators and thus cannot establish that she was similarly situated. "In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.*

As Finance Center Supervisor, Plaintiff has been responsible for assisting with the handling of loan originations and loan sales, establishing employee loans, recording employee loans on the SHIPS database, and coaching and training Finance Center staff and interns. Plaintiff is also responsible for facilitating the bad debt reported by SCES's loan purchaser, Fannie Mae. As noted above, Plaintiff admits that her position within SCES is unique and that she is not aware of anyone else who performs a job similar to hers.

Plaintiff alleges that Dena Faessel, who is white, was a Project Analyst Senior that, at $ 65,000 per year, was paid more than Plaintiff while holding the same job title as Plaintiff during the period in question. However, Faessel worked in the PowerCall Security unit in Pensacola, Florida. When she held the SHIPS job title of Project Analyst Senior, Faessel was responsible for performing auditing and due diligence analyses of companies which

Powercall was interested in acquiring and working with those newly-acquired companies to commence business operations. Faessel's functional job title was Project Manager or Project Executive. Faessel holds an associate's degree in business administration, a bachelor's degree in finance, and a master of business administration degree.

Plaintiff also alleges that Kathy Robb, who is white, was a Project Analyst Senior that, at $ 54,000 per year, was paid more than Plaintiff while holding the same job title as Plaintiff. However, Robb works in the Energy Services unit in Atlanta, Georgia. While she held the SHIPS job title of Project Analyst Senior, Robb was responsible for sales and marketing management for SCES's commercial lighting retrofit business. In this position Robb conducted oversight of SCES's contractual obligation to retrofit every Tyson poultry processing plant, hatchery, and feed mill in order to help Tyson comply with specific EPA requirements. Her duties included surveying each facility, performing an analysis of lighting savings and pricing installation of lighting equipment for each facility, and managing audits. Robb oversaw a staff of auditors to manage retrof its at Tyson facilities nationwide. Robb also prepared proposals for retrof its and presented those proposals to SCES and Tyson senior management, worked closely with Tyson's energy director, negotiated new contracts with electrical contractors, explained new energy savings technologies, and maintained a strong working relationship with Tyson. Robb's functional title was Team Leader for SCES's Lighting Retrofit Department.

Jimmy Allen works for SCES as a Project Manager. From April 1998 through November 1999, Allen held the SHIPS database title of Project Analyst Senior. During that time, Allen was responsible for overseeing commercial

construction projects, including contract negotiation and on-site construction management, managing day-to-day activities for large commercial construction projects for SCES's customers, ranging from smaller lighting installation projects to the construction of major chiller plants, negotiating contracts with customers and contractors, working with customers and contractors to develop and implement construction plans, managing business and construction problems as they occurred, and handling customer complaints. Allen typically worked on construction sites rather than in an office environment. Allen's functional job title during that time was Project Superintendent.

Nor are the three white co-workers with lower titles than Plaintiff's similarly situated to Plaintiff. Marianne Ellis worked for the PowerCall unit in Atlanta. Roberts Dec. P 6. Ellis initially served as Executive Secretary to David Sherrill, General Manager within SCES in Atlanta, then to Anthony Roberts, PowerCall's Operations Manager from 1998 to 2000. *Id.* Ellis was responsible for performing various secretarial duties, as well as managing her supervisor's appointments. *Id.*

Barbara Stokes worked as a Project Specialist in the PowerCall business unit in Atlanta. *Id.* at P 5. In this capacity, Stokes was responsible for supporting PowerCall customer service operations, entering customer orders, managing customer accounts, and managing billings for PowerCall's residential and commercial security system customers. *Id.*[6]

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[6] Plaintiff also asserted in her complaint that she was improperly paid less than Reba Jones. Defendants contend that Plaintiff cannot

(Continued on following page)

Plaintiff does not attempt to show that she performed the same functions or even the same type of work as these alleged comparators. Instead, Plaintiff argues that Defendants cannot rely on differences in job function to justify any pay disparity because Defendants allegedly use job title, rather than function, as an internal measure of pay equity. This argument goes to whether Defendants have a legitimate non-discriminatory reason for pay disparity and does not cure Plaintiff's failure to show that she performed the same type of functions as these alleged comparators. Because Plaintiff fails to show that she was similarly situated to these alleged comparators, she cannot show that she was treated unfairly with respect to compensation.

Nor can Plaintiff establish that Defendants were motivated by a discriminatory intent when they made decisions with respect to Plaintiff's compensation. Fuller testified that to determine Plaintiff's compensation for the Project Analyst position, she had to determine Plaintiff's then-current salary and could then increase that figure by either 6 or 8%, because this was the procedure for setting compensation when filling a position internally. Fuller Dep. at 36, 61-62. Plaintiff attempts to establish discriminatory intent by contradicting the evidence that Fuller believed that a 6 to 8% increase was appropriate in setting compensation for an internal hire. Specifically, Plaintiff points to evidence that another SCES employee received a

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establish that Jones performed functions similar to Plaintiff's and thus cannot establish a prima facie case but fail to point to any evidence in the record to support this position. However, Plaintiff does not respond to this argument and thus is deemed to have abandoned her claim with respect to this comparator.

12% increase in salary after he was promoted just three months after Plaintiff. However, Plaintiff does not contend that Fuller set the compensation for the other employee. Plaintiff also points to the testimony of Steven Wilkinson, a human resources representative, that a manager has discretion to raise a promoted employee's salary more than 8% when the 8% increase would be insufficient to egualize [sic] the promoted employee's compensation with that of similarly situated employees. That Fuller had the discretion to increase Plaintiff's salary more than 8% to equalize her pay with respect to similarly situated co-workers but did not might constitute evidence of discriminatory intent. However, as discussed above, Plaintiff has failed to establish that she was paid less than similarly situated employees and thus cannot show that Fuller had the discretion to increase Plaintiff's salary more than 8% but chose not to.

Plaintiff also contends that she can demonstrate discriminatory intent with evidence that other black employees in her department received compensation below the minimum of their pay grade level. This evidence is insufficient to establish discriminatory intent. Plaintiff points to no evidence with respect to the overall compensation levels within the department or evidence with respect to the employment history of these other employees. That some black employees within Plaintiff's department received low compensation does not, on its face, constitute evidence of a pattern of discrimination and is not evidence that Defendants operated with a discriminatory intent in setting Plaintiff's compensation.

Plaintiff also argues in her response to Defendants' motion for summary judgment that she can establish a prima facie case of compensation discrimination by showing that she was paid less than white employees who

possessed the same level of education and experience and who performed the same job function as Plaintiff. In support of this contention, Plaintiff points to her own affidavit, in which she apparently describes her job functions, and to the reports of Plaintiff's expert, Dr. Janice Madden. However, Plaintiff did not include her affidavit in the Appendix to Plaintiff's Response to Defendants' Motion for Summary Judgment. With respect to Dr. Madden's reports, Plaintiff contends that these reports support her contention that she was paid less than white employees who possessed the same level of education and experience and who performed the same job function as Plaintiff.

Plaintiff specifically relies on Dr. Madden's findings in her third report, attached to Plaintiff's Appendix to Plaintiff's Response to Defendants' Motion for Summary Judgment as Exhibit 18. Plaintiff contends that Dr. Madden's estimation that "Caucasians with the same education, experience and job function" as Plaintiff earned more than similarly situated black employees, including Plaintiff, constitutes evidence that Plaintiff was paid less than white co-workers performing the same job functions as Plaintiff. However, Dr. Madden's report contains no specific information, much less evidence, with respect to identity of these alleged comparators or their job functions. Indeed, Dr. Madden states that she developed her estimate "using the earnings of promoted employees identified by counsel as comparable to the plaintiff[]." App. to Pla. Resp. to Def. Mot. S.J., Ex. 18 at 2. There is no specific detail in the exhibit with respect to the information counsel provided to Dr. Madden, making it impossible to determine whether the estimate Dr. Madden developed

is an accurate proxy for evidence that a proper comparator was paid more than Plaintiff.

Plaintiff also suggests that Dr. Madden's earlier reports, offered in support of the motion for class certification, provide evidence of a pattern and practice of discrimination which is sufficient to state a prima face case of compensation discrimination. However, for the reasons stated below, these reports are insufficient to establish a pattern and practice claim and further lack any detail with respect to Plaintiff's specific compensation claims and thus do not support Plaintiff's attempt to establish a prima facie case.

Plaintiff also alleged in the complaint that she was discriminated against with respect to compensation when she failed to receive a second $ 5,000 pay increase in March 1999, which she alleges Defendants promised to her. Defendants argue that Plaintiff cannot establish a prima facie case with respect to this claim because she has not put forward any evidence that she failed to receive the second pay increase because she is black. Plaintiff did not respond to this argument and thus is deemed to have abandoned this claim.

Because Plaintiff has failed to provide sufficient evidence to establish a prima facie of compensation discrimination, Defendants' motion for summary judgment is GRANTED with respect to this claim.

SHIPS Coding Mistake

In the complaint, Plaintiff alleges that she was discriminated against when Defendants offered her a Project Analyst Senior position but coded Plaintiff's position as

Project Analyst III within Defendants' SHIPS database and then corrected her job title in March 2000 to bring her title into conformance with the coding. Defendants argue that Plaintiff cannot establish a prima facie case because the title change does not constitute an adverse employment action and because Plaintiff cannot show that a similarly situated white employee was treated more favorably than she was. However, Plaintiff fails to respond to these arguments and thus is deemed to have abandoned this claim.

Performance Evaluations

Similarly, Plaintiff alleged in the complaint that she was discriminated against when she failed to receive performance evaluations after 1997. Defendants contend that Plaintiff cannot establish a prima facie case because she admits that she received performance evaluations after 1997. Defendants further contend that Plaintiff cannot establish a prima facie case that she received discriminatorily Low evaluations because a low evaluation does not constitute an adverse employment action. Plaintiff fails to respond to either of these arguments and thus is deemed to have abandoned this claim.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. Plaintiff has offered only statistical evidence to support her pattern or practice claim. Under the pattern or practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's*

Stone Crab, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (2.989); In re: *Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support her argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with

respect to Plaintiff's pattern and practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. To establish a claim under a theory of disparate impact, Plaintiff must show 1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; 2) the existence of a specific, facially neutral employment practice; and 3) the existence of a causal nexus between the specific[1] [sic] facially neutral employment practice and the statistically significant disparity. 42 U.S.C. § 2000e-2(k); *Joe's Stone Crab*, 220 F.3d at 1274; *Crum v. Alabama (In re Employment Discrimination Litig.)*, 198 F.3d at 1311-14. Defendants contend that Plaintiff's statistics, which are not adjusted to account for differences among various positions and the respective skill and education levels required, are insufficient to establish a statistically significant disparity required to state a claim. Plaintiff argues in response that her statistical evidence is sufficient to create a genuine issue of material fact precluding summary judgment.

As evidence of a facially neutral policy, Plaintiff points to Defendants' use of subjective criteria in determining which applicants to interview and thus which applicants to hire. While Plaintiff has failed to identify in her response to Defendants' motion for summary judgment a specific policy which has had an impermissibly discriminatory impact on her, Plaintiff provided evidence in his motion for class certification to support his claim that

Defendants allowed the use of subjective criteria by decisionmakers in each of its subsidiaries.

However, showing that Plaintiff was subject to subjective policies does establish a prima facie case of disparate impact. Plaintiff must also show the existence of a causal nexus between these specific, facially neutral employment practices and a statistically significant disparity. "'[P]laintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Joe's Stone Crab*, 220 F.3d at 1275 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988)). In this case, Plaintiff has failed to establish that the use of subjective hiring criteria caused a statistical disparity within the promotions for which she applied.

To establish the first element of a disparate impact claim, Plaintiff relies on her expert's report which finds statistically significant disparities in the promotion of black employees relative to white employees. As Defendants note, however, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); In re: *Alabama*, 198 F.3d at 1312. Plaintiff's expert reports an over-all statistical disparity between black and white employees in hiring and promotion by Defendants. However, Plaintiff's statistics – which compare promotions among employees within the same pay grade who perform similar job functions – fail to distinguish between positions in which Defendants' decisionmakers applied the express objective hiring factors

and those in which the decisionmakers employed subjective criteria. Further, Plaintiff's evidence generally fails to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to promotions. Plaintiff's evidence also fails to compare outcomes for those employees who actually applied for posted positions. Nor does Plaintiff's evidence distinguish between competitive and non-competitive promotions; such deficiency further undermines the probative value of Plaintiff's statistics. *See Forehand v. Florida State Hospital at Chattahoochee*, 89 F.3d 1562, 1572-73 (11th Cir. 1996).

Because of these deficiencies, Plaintiff cannot establish the existence of a causal nexus between a specific, facially neutral employment practice and a statistically significant disparity. *See, e.g., Joe's Stone Crab*, 220 F.3d at 1279. In Joe's Stone Crab the Eleventh Circuit found that the EEOC failed to establish a disparate impact claim where the EEOC presented no evidence that the employer's use of subjective criteria caused minority applicants not to apply or that minority applicants for positions at issue were disadvantaqed by the subjective criteria. Similarly, in this case Plaintiff fails to point to any evidence linking Defendants' use of subjective criteria to the alleged statistical disparity. Therefore, Defendants' motion for summary judgment with respect to Plaintiff's disparate impact claim is granted. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that employer is entitled to summary judgment where plaintiff fails to provide evidence necessary to prove at trial that there is

disproportionate impact of employer's policy on black employees).

For the reasons stated above, Defendants' motion for summary judgment is GRANTED.

SO ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1352; 2003 U.S. Dist. LEXIS 5722

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the Court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Cornelius Cooper. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed except as indicated otherwise. Plaintiff has worked exclusively for Defendant

Georgia Power Company ["GPC"] since 1973.[1] Since approximately October 1996, Plaintiff has been assigned to work on a two-man team as a lineman performing

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[1] Defendants The Southern Company ["TSC"], Southern Company Energy Solutions, Inc. ["SCES"], and Southern Company Services ["SCS"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did he ever apply for positions at TSC, SCES, or SCS. Plaintiff has failed to respond to SCES's motion and is deemed to have abandoned his claim against SCES. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1242 (11th cir. 1998). An "employee" for Title VII purposes is an "individual[] who receive(s) compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be *shown* that TSC constituted an "employer" from whom Plaintiff received compensation.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations; however, even if this were true, it is irrelevant with respect to Plaintiff's claims. Plaintiff has failed to provide evidence that any SCS employees were involved in any allegedly discriminatory acts. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCES and SCS.

underground streetlight cable repairs. Since approximately October 1996, Plaintiff has not worked on a line crew nor worked on overhead lines as part of his regular job responsibilities.

In July 1998, GPC's Lighting Services Business Unit ("LSBU") posted openings for two Lighting Coordinator positions on JobNet, Defendants' internal job posting program. Lighting Coordinators are responsible for supervising and overseeing the installation of outdoor lighting systems performed by teams of independent contractors. Lighting Coordinator duties include managing sales orders for installations of new outdoor lighting units through completion of an installation project, checking the construction specifications and materials list for an installation project, scheduling installation project work, managing and overseeing the work performed by contractor crews, resolving problems that arise on the site, and reviewing the bills submitted from the contractors.

LSBU Sales Manager Mike Clay was the hiring manager responsible for selecting individuals to interview from among the applicants for the July 1998 Lighting Coordinator openings, as well as deciding which individuals would be offered the two positions. There were over fifty applicants, including Plaintiff, who applied for the two positions. Plaintiff was not among those selected to interview for the Lighting Coordinator positions.

Clay made the final decision on whom to offer the two Lighting Coordinator positions and selected Donald Callihan and Gene Edwards to fill the two Lighting Coordinator positions. Both Callihan and Edwards initially accepted Clay's offer to fill the Lighting Coordinator positions. Less than one week after he accepted the position, Callihan

changed his mind and turned the offer down, leaving one of the two positions open.

Between the time Callihan and Edwards were offered the Lighting Coordinator positions and when Callihan turned the offer down, a new Operations Manager, Ken Leonard, was hired to oversee the Lighting Coordinators in the LSBU. Leonard assumed the responsibility for filling the one open Lighting Coordinator position. To determine who would be interviewed for this position, Leonard reviewed the list of candidates whom Clay had initially selected for interviews and discussed these candidates with Clay. Out of the previous pool of nine interviewees, Leonard decided to interview Ronnie Turner and Glen Hicks. Leonard also decided to interview two candidates, Frank Gilliam and Duane Johnson, who had not previously applied or interviewed for the position but who subsequently personally expressed interest in the position to Leonard. Leonard did not consider Plaintiff for an interview because Leonard had decided not to interview any of the approximately forty-seven applicants who were not initially selected for an interview by Clay. Leonard decided to offer the position to Turner. Turner declined the Lighting Coordinator position when Leonard offered it to him, so Leonard next offered the position to Nicks [sic]. Hicks accepted the offer and became a Lighting Coordinator.

In August 1998, Training Manager F.R. Howard posted six openings for Power Delivery Specialists (now known as "Methods & Training Specialists" or "Trainers") at GPC's Training Center. Trainers provide hands-on training to line crew employees in current safety and job-related skills necessary for lineman work. Openings for Trainer positions usually attract a large number of qualified applicants, including crew leaders, foremen and

linemen. As the hiring manager for the six Trainer positions, Howard was responsible for selecting applicants to interview and deciding who to hire for these positions. Approximately eighty-seven individuals, including Plaintiff, applied for the six open positions. Howard selected fourteen applicants to interview for the six available positions. Plaintiff was not among the fourteen candidates Howard selected for an interview.

This action was filed on July 27, 2000. In the complaint, Plaintiff alleges that Defendants discriminated against him by subjecting him to a hostile work environment and by improperly denying Plaintiff promotions.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in their motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the Court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574,

587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (*quoting* Fed.R.Civ.P. 56(e)).

As an initial matter, all of Plaintiff's Title VII claims must be dismissed as untimely. In order to assert a claim under Title VII, a plaintiff must file a charge of discrimination with the Equal Employment Opportunity Commission ["EEOC"]. 42 U.S.C. § 2000e-5(e)(1); *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 848 (11th Cir. 2000). Any claims under Title VII based on alleged events that occurred more than 180 days before the filing of an EEOC charge are barred by the applicable statute of limitations. 42 U.S.C. § 2000e-5(e)(1); *Stewart*, 232 F.3d at 848. Plaintiff did not file an EEOC charge himself but apparently intends to "piggy-back" on the EEOC charge filed on July 21, 2000, by co-plaintiff Michael Edwards. Because none of the acts about which Plaintiff complains occurred on or after January 24, 2000, Plaintiff fails to state a claim under Title VII.

Nor can Plaintiff state a claim under Section 1981 based on alleged events that occurred more than two years before the filing of this lawsuit, or before July 28, 1998. *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1546 (11th Cir. 1988) (recognizing two-year statute of limitations for section 1981 claims filed in federal court in Georgia). The only allegations Plaintiff now maintains which are timely under Section 1981 are (1) his claim that he was denied a promotion to a Lighting Coordinator position in July 1998 and (2) his claim that he was denied a promotion to a Trainer position in August 1998.

Section 1982 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976);

Ferrill v. Parker Group, Inc., 168 F.3d 468, 472 (11th Cir. 1999). Under Section 1981, an employer may be found liable for unlawful discrimination under either of two discrete theories: disparate treatment discrimination or pattern and practice discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1273 (11th Cir. 2000). Both theories require proof of discriminatory intent. *Id.* at 1273.

To establish a *prima facie* case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

To make a *prima facie* case using circumstantial evidence, a plaintiff may use the test established in *McDonnell Douglas.*[2] A plaintiff may establish a *prima facie* case by demonstrating 1) that he belongs to a protected class; 2) that he was qualified for and applied for the job; 3) that he was rejected; and 4) that others who were not members of the protected class were promoted. *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997).

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[2] The *McDonnell Douglas* standard for a *prima facie* case is applicable in employment discrimination suits brought under 42 U.S.C. § 1981. *Sledge v. Goodyear Dunlop Tires North America, Ltd.*, 275 F.3d 1014 (11th Cir. 2001).

If the plaintiff provides sufficient circumstantial evidence to support a *prima facie* case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *McDonnell Douglas*, 411 U.S. at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a *prima facie* case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice

claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown v. American Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991) (*citing Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

A. Disparate Treatment

1. Hostile Work Environment

In the complaint, Plaintiff alleges that Defendants discriminated against him when he was repeatedly subjected to offensive comments about his race. Third Amended Complaint P 72. Defendants contend that Plaintiff abandoned this claim prior to Defendants' motion for summary judgment. Plaintiff does not respond to this argument and thus is deemed to have abandoned this claim. Defendants are therefore entitled to summary judgment on this claim. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

2. Promotion Discrimination

Plaintiff also alleges that Defendants discriminated against him by improperly denying him promotions. Plaintiff contends that Defendants discriminated against him when white applicants were promoted over Plaintiff to a Lighting Coordinator position in July 1998 and to a Trainer position in August 1998. Plaintiff further alleges that he has been treated differently than the following individuals because of his race: Rick Mondy, Leonard

Fletcher, Danny Sly, Davis Sutton, Darrell Wright, Bo Smith, and Joe Brown Lee.

Lighting Coordinator

Defendants do not dispute that Plaintiff can establish a *prima facie* case with respect to this position but argue that Plaintiff cannot overcome their asserted non-discriminatory reasons for the decision not to hire Plaintiff.[3] According to Defendants, after the application period closed, Clay received a computer-generated list of approximately 55 individuals who applied for the position through JobNet. Clay Dec. P 7. Clay also received a computer-generated candidate profile for each applicant that listed the applicant's employment history with Defendants and, if submitted by the applicant, a statement of why the applicant believed that he was qualified for the position. *Id.* Clay, with the assistance of LSBU Operations Manager Lisa Meyers, reviewed all of the applicants' qualifications listed on the candidate profiles in order to select qualified applicants to interview for the openings. Clay based the interview selections on criteria they determined were relevant for the job, including a minimum of two years experience in power delivery; demonstrated strength in communication, initiative, leadership, and teamwork skills; and preferred experience in contract administration and supervising contractors. In deciding whom to interview, Clay considered the qualifications described on the applicants' candidate profiles as well as any personal knowledge they possessed concerning applicants'

[3] Although Defendants state that Plaintiff "cannot" establish a *prima facie* case, *see* Def. Mot. S.J. at 19, they fail to make any argument to support this position.

qualifications and any recommendations for the applicants they had received from managers, supervisors, or other employees.

Nine applicants were selected to interview for the two open positions: Gene Edwards, Glen Hicks, Ronnie Turner, Anthony Paramore, Pete Camp, Harry Lindsey, Perry Craig, Jimmy Jones, and Donald Callihan. In making his interview decisions, Clay first ruled out any applicant whose candidate profile did not indicate that the applicant had power delivery experience. Clay Dec. P 10; Clay Dep. at 24, 103. Clay then selected all of the applicants who had served as a foreman because Clay believed that those individuals had demonstrated initiative, communication skills, and leadership skills and it was likely that these candidates had knowledge of contract administration and experience supervising contractors. Clay Dec. P 10. Other applicants were granted interviews if the applicant had power delivery experience and either (1) Clay or Meyers knew the applicant's qualifications personally, (2) Clay received a recommendation for the applicant, or (3) the applicant demonstrated initiative by expressing special interest in the position to Clay or other LSBU employees in gaining knowledge of the duties of the Lighting Coordinator position. Clay Dec. P 11; Clay Dep. at 25, 35-37, 45, 65, 74.

Clay contends that he did not select Plaintiff for an interview because Clay did not glean from Plaintiff's application that Plaintiff had initiative, communication skills, leadership skills, knowledge of contract administration, or experience supervising contractors. To the best of Clay's knowledge, Plaintiff had never worked as a foreman, had not demonstrated any initiative or special interest in the position by seeking out Clay or other

members of the LSBU, nor had Clay received any recommendations on Plaintiff's behalf. Clay Dec. P 16; Clay Dep. at 80.

After one of the successful candidates turned down the offer for the position, Leonard interviewed only those candidates who had either (a) applied for the position through JobNet and had been granted an interview by Clay, or (b) actively sought the position by seeking out Leonard to discuss the position. Leonard Dec. PP 4-5; Leonard Dep. at 18-20. According to Defendants, Leonard sought and received approval from the Human Resources department to consider Gilliam and Johnson for the vacant position. Plaintiff did not fall within either of these two categories and thus was not granted an interview. These reasons constitute legitimate, non-discriminatory reasons for the decision not to hire Plaintiff. *See, e.g., Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001) (that successful candidate possessed the qualities that decisionmaker considered dispositive in choosing among the pool of qualified applicants constituted legitimate non-discriminatory reason); *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000) (that successful candidate was better qualified with respect to three of the four criteria listed in the position application constituted legitimate non-discriminatory reason).

In response, Plaintiff attempts to establish pretext by showing that the reasons cited by Defendants were not the actual reasons for the decision not to hire Plaintiff. *See Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804, 810-11 (11th Cir. 1989) (noting that plaintiff may show pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is

unworthy of credence). Defendants are certainly entitled to employ subjective criteria in making a hiring decision. *Murphy v. Yellow Freight System, Inc.*, 832 F. Supp. 1543, 1548 (N.D.Ga. 1993) ("The use of subjective factors in making employment decisions cannot be sufficient to support a finding of discrimination."). The proper pretext analysis is whether the plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (internal quotation marks and citations omitted).

First, Plaintiff points to Leonard's testimony that most of the criteria considered by Clay – initiative, communication skills, leadership skills, knowledge of contract administration, and experience supervising contractors – cannot be determined from a candidate profile and that it would be unfair to consider an applicant based solely on his profile if the hiring manager was looking for this criteria. Leonard Dep. at 38. However, that Leonard believes it would be unfair to rely solely on the candidate profile when employing the stated criteria does not render Clay's explanation unworthy of credence. Clay testified that he considered not only the candidate profiles, but also the resumes that some of the applicants submitted, the recommendations he received on behalf of applicants, and the initiative displayed by those applicants who contacted him or other LSBU employees directly to learn more about the position.

Plaintiff also contends that Clay's explanation is not credible because Clay testified that at the time he decided who to interview for this position, it was possible that he

did not know anything about the communication skills or the contract administration experience of some of the candidates. Clay Dep. at 33, 39, 52, 57-60. Plaintiff contends that this evidence establishes that Clay did not actually consider the stated criteria in deciding whom to interview or that he did not require the white applicants to meet those criteria. However, Clay's testimony that he may not have had information about the specific skills of some of the applicants he selected for interviews does not contradict Clay's explanation of the selection process. Clay testified that he relied on the recommendations received from other managers or LSBU employees to determine whether the applicants he did not know personally possessed strong initiative, communication, leadership, or teamwork skills. Clay Dec. P 11. Further, that Clay may not have had specific information about an applicant's skills in a particular area at the time he determined which applicants to interview does not establish that Clay did not actually consider those qualities. Rather, Clay testified that he considered certain qualifications, such as foreman experience, supervisor recommendations, and an applicant's initiative in contacting Clay, as proxies for some of the specific criteria he used to cull the applicant pool. *Id.* PP 10, 11, 13.

Plaintiff also attempts to establish that Clay's claim that he selected for interviews those employees for whom he received recommendations is pretext for discrimination. Specifically, Plaintiff points to evidence that there is no written record of any alleged recommendations, that Clay cannot recall the specific details of the recommendations, and that Defendants did not note these alleged recommendations in response to Plaintiff's interrogatories seeking all the reasons Defendants assert to explain why

Plaintiff was not awarded this position. None of these arguments create an issue as to pretext. Plaintiff argues that Clay violated Defendants' selection document processing policy by failing to retain records of the recommendations. However, to support this argument Plaintiff points only to a blank copy of the selection processing document and the applicable instructions, which require that the document be completed with basic information regarding the hiring process. *See* Pla. Resp. to Def. Mot. S.J., Exs. 33, 34. Plaintiff fails to point to any evidence with respect to the actual document reflecting the hiring process at issue or to any evidence that Clay was specifically required to maintain such records. That Clay could not recall during his deposition the specific details of the recommendations received almost four years earlier does not suggest pretext.

Plaintiff also contends that pretext is established by the fact that recommendations Clay received were not performance-based. Plaintiff apparently contends that Clay's claim that he relied on the recommendations in determining who to interview is not worthy of credence because the recommendations were not based on the applicants' performance. Clay Dep. at 27, 47-49, 50-51, 53-55, 65-66, 73. However, Plaintiff mischaracterizes Clay's testimony. The passages to which Plaintiff cites reflect that the recommendations Clay received were general statements regarding an applicant's suitability for the position. That Clay was unable to recall in his deposition the specific relationships between the applicants and the managers or co-workers who recommended them or the recommendations' details does not establish that the recommendations were not based on the applicants' performance. Plaintiff points to no affirmative evidence that the recommendations were based on anything other

than performance. That Clay did not provide detail with respect to the substance of all of the recommendations does not convert his consideration of such into an "informal, secretive and subjective hiring or promotion decision process[] tending to facilitate the consideration of impermissible criteria." *Roberts v. Gadsden Mem. Hosp.*, 835 F.2d 793 (11th Cir. 1988).

Plaintiff's contention that Clay's reliance on the recommendations received on behalf of some of the applicants constitutes consideration of a non-disclosed factor creating "leeway" for discrimination also must fail. Plaintiff has pointed to no evidence suggesting that Clay omitted a suggestion for recommendations from the job posting or relied on the recommendations for the purpose of discriminating against black applicants. Nor is there evidence that Clay's reliance on the recommendations constituted a deviation from the standard hiring process. Compare *Hill*, 885 F.2d at 811. That Clay relied on the receipt of the recommendations does not in itself constitute evidence of discriminatory intent and thus does not constitute evidence of pretext. Compare *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1106 (11th Cir. 2001).

Plaintiff also contends that pretext is established by the fact that some of the employees selected for interviews did not meet the minimum qualifications for the job. Plaintiff points to evidence that Harry Lindsey, one of the employees selected for an interview, received a performance evaluation shortly before being interviewed which states that Lindsey's "performance needs improving in . . . the way he communicates with his crews and peers," that Lindsey "does not always set effective goals and objectives for himself and his crew members," and that Lindsey "does not always exhibit good listening and comprehension

skills." Pla. Resp. to Def. Mot. S.J., Ex. 19 at Q22257-58. However, Lindsey's evaluation is irrelevant because Clay testified that he did not consider an applicant's seniority or performance evaluations in making the decisions with respect to this position. Clay Dec. P 14. Plaintiff has not presented any evidence to dispute Clay's testimony that he did not consider performance evaluations.

Plaintiff also argues that pretext is established by Clay's violation of Defendants' affirmative action policy. Plaintiff points to evidence that the policy requires "reviewing the qualifications of employees to ensure that minorities . . . are given full opportunities for transfers and promotions." Pla. Resp. to Def. Mot. S.J., Ex. 31 at D5779. Plaintiff contends that Clay admitted that he did not attempt to discover anything about Plaintiff's qualifications before making the employment decision. Again, however, Plaintiff has mischaracterized Clay's testimony.

> Q. Why didn't you select (Plaintiff] to interview for the position?
>
> A. I don't know specifically about [Plaintiff] why he wasn't chosen. Didn't know him one way or another.
>
> Q. Did you attempt to find anything out about [Plaintiff]?
>
> A. No, I did not. There were a lot of people that applied and we didn't attempt to find out about a lot of them.
>
> Q. So you said a lot of people applied and you didn't attempt to find out anything about a lot of them. Is it fair to say that if you had not received a recommendation for anyone that they would not be considered?

. . . .

A. I don't know if that's fair to say or not.

Q. So if you did not receive a recommendation for a lot of the people who had applied for the job, how could you ever know what their qualifications are?

A. You know some of the qualifications from the candidate sheets, the profiles and the information you get on there. And that's basically what you know.

Clay Dep. at 99, 100. Clay's testimony indicates that he did not actively seek out information about Plaintiff but relied on the information included in the candidate profile. There is no evidence to suggest that Clay was required to actively investigate each applicant's qualifications and Clay's testimony supports a finding that Clay in fact complied the requirement that he review all the applicants' qualifications.

Plaintiff also attempts to establish pretext by attacking the credibility of Clay's declaration testimony. Specifically, Plaintiff points to Clay's declaration testimony that he relied on several factors and notes that Clay did not articulate these factors in response to requests to identify all such reasons and argues that such discrepancy constitutes evidence of pretext. However, that Defendants did not initially assert every reason justifying their decision with respect to this position does not contradict their later assertions and thus fails to support a finding of pretext.

Plaintiff further claims that he can establish pretext by showing that two of the successful candidates were not more qualified than he was for the position. Specifically, Plaintiff points to Leonard's testimony that he did not

have evidence "that would prove that [Plaintiff] was not the most qualified person for that position," Leonard Dep. at 70-71, and the hiring managers' testimony that they did not compare Plaintiff's qualifications to Edwards' and Hicks' at the time of the decision at issue. *Id.* at 50; Clay Dep. at 81-86. Plaintiff also points to evidence that he had more experience than Edwards and Hicks and that Hicks received poor performance evaluations. However, the inquiry at issue is not whether Plaintiff was the most qualified person for the position but whether the decisionmakers actually believed that Plaintiff was not. Plaintiff has provided no evidence to contradict Defendants' evidence on this point. Further, even if Plaintiff could establish that his experience made him more qualified, "in a failure to promote case, a plaintiff cannot prove pretext by simply showing that she was better qualified than the individual who received the position that she wanted. . . . Disparities in qualifications are not enough in and of themselves to demonstrate discriminatory intent unless those disparities are so apparent as virtually to jump off the page and slap you in the face." *Denney*, 247 F.3d at 1187 (internal quotation marks and citations omitted). Plaintiff's evidence that he had more experience than two of the applicants and that one applicant received a poor performance evaluation certainly fails to meet that standard.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' hiring and promotion practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support his claim that Defendants' hiring and promotion practices had a discriminatory effect on black employees. Plaintiff argues that the reports of his expert, Dr. Madden, which find statistically significant

disparities in the promotion of black employees relative to white employees, are evidence from which a reasonable factfinder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is itself reflective of restrictive or exclusionary practices. . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n.19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently tailored to support his individual claims.

Plaintiff's statistics compare the promotion rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to hiring decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions, or outcomes for those employees, both black and white, who had actually applied for posted positions challenged by Plaintiff. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations

in which he worked or the positions which he challenges. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952 (11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish *prima facie* case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish *prima facie* case or pretext where evidence failed to make specific analytical comparisons); *cf. James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[4] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination where the employment decisions were based on completely subjective criteria).

Further, even if Plaintiff had evidence of pretext, Plaintiff cannot not overcome his burden of establishing

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[4] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

discriminatory intent because the undisputed evidence shows that the decisionmakers did not know that Plaintiff is black. As noted above, in a section 2.981 case, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown v. American Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991) (*citing Grigsby v. Reynolds Metal Co.*, 821 F.2d 590, 595 (11th Cir. 1987)). If the decisioninakers did not know that Plaintiff was black, they could not have intended to discriminate against him on that basis. *Cf. Trotter v. Board of Trustees of the Univ. of Ala.*, 91 F.3d 1449, 1457-58 (11th Cir. 1996); *Silvera v. Orange Co. Sch. Bd.*, 244 F.3d 1253, 1262 (11th Cir. 2001).

Defendants contend that it is undisputed that none of the individuals who made the hiring decisions concerning the Lighting Coordinator job knew that Plaintiff is black. The race of the applicants was not indicated on the computer generated list of applicants or the candidate profiles that Clay was given after the posting for the Lighting Coordinator position had closed. At the time Clay and Leonard selected candidates to interview, neither Clay nor Leonard knew Plaintiff personally, nor did they know Plaintiff's race. Clay Dec. P 16; Leonard Dec. P 8. Plaintiff attempts to create an issue of fact by pointing to the following evidence: that the decisionmakers had access to Defendants' employee pictorial directory and employee database in which Plaintiff's race is revealed; that the hiring managers could ascertain Plaintiff's race from his name; and that although Clay and Leonard may not have known Plaintiff's race, they relied on the recommendations of others who did know Plaintiff's race. The law is clear that where the decisionmaker relied upon the recommendations

of employees and does not conduct an independent evaluation, any racial animus of the other employees is imputed to the decisionmaker. However, Plaintiff has failed to put forward evidence of a racial animus on the part of any of the supervisors making recommendations; moreover, even if Plaintiff could produce it, such evidence in itself is insufficient to establish pretext. Rather, because the hiring managers did not receive a recommendation on Plaintiff's behalf, Plaintiff would also have to show that the supervisors making recommendations on behalf of other workers did so with the intent of injuring Plaintiff because of his race.

Plaintiff also contends that the selection of only white applicants constitutes evidence that the hiring managers used some means to discover Plaintiff's race and made race-based decisions as to which applicants to interview. According to Plaintiff, the statistical probability that only white applicants would be selected for interviews is less than 5%, leaving a greater than 95% chance that the selection process was not race neutral. However, the only evidence Plaintiff submits in support of this argument is an inadmissible expert report. The sum of Plaintiff's evidence only supports a finding that Clay or Leonard could have discovered Plaintiff's race and does not contradict Defendants' evidence that neither Clay nor Leonard actually knew Plaintiff's race at the time they decided which applicants to interview. Plaintiff therefore cannot establish discriminatory intent with respect to hiring decision for this position. Accordingly, Plaintiff's claim with respect to this position must fail.

Trainer

Defendants contend that they are entitled to summary judgment on this claim because Plaintiff cannot establish that Defendants' asserted non-discriminatory reason for the decision not to hire Plaintiff for this position is pretext for discrimination. In response, Plaintiff contends that he can establish a *prima facie* case and can demonstrate the Defendants' asserted reasons for the decision not to hire him are pretext.

According to Defendants, the Trainer position requires not only technical expertise and experience but also effective communication skills and the ability to instruct and teach proper methods and techniques. Defendants contend that Howard, the hiring manager for this position, knew Plaintiff through personal experience and determined that Plaintiff did not have the qualifications that Howard was looking for in this position. According to Defendants, Howard used several non-discriminatory criteria to evaluate those qualifications.

First, Howard determined that Plaintiff had not demonstrated effective communication skills or the depth of knowledge required for the Trainer position on the occasions when Plaintiff served as a guest instructor at the Training Center. Defendants contend that some Screening Committee members had told Howard that they recalled that Plaintiff had trouble drafting wiring switching orders and articulating training instructions to student employees, which indicated a deficiency in the necessary skills for the Trainer job. Howard Dec. P 20; Howard Dep. at 48-49, 87-88, 93.

Howard further contends that he did not believe that Plaintiff had up-to-date knowledge with respect to all

facets of line crew work. Howard Dec. P 18; Howard Dep. at 75, 87-88. At the time of his application for this position, Plaintiff had worked exclusively in an underground streetlight cable repair position for almost two years. Pla. Dep. I at 123; Pla. Dep. III at 147-50. Because Plaintiff's position involved only underground repair of streetlight cables, Howard determined that Plaintiff's job functions were not sufficient to maintain sufficient current knowledge in all job-related and safety aspects of underground and overhead line crew work. Pla. Dep. III at 147-50; Howard Dep. at 53-54, 75, 82, 87-88; Howard Dec. P 18. Howard asserts that he was troubled by the fact that Plaintiff's work in underground streetlight cable repair indicated that he had been working as an individual contributor, rather than as a member of a team. According to Howard, Trainers must work very closely with both the students they teach and other trainers and guest instructors, and thus they must have exemplary teamwork skills. Howard Dec. PP 5, 19; Howard Dep. at 53-54.

Defendants contend that for all of these reasons, Howard decided not to grant Plaintiff an interview for the Trainer position openings which were posted in August 1998. Instead, Howard selected other candidates from the eighty-seven applications he received and ultimately he awarded the positions to James Smith, Joseph Wheeler, Frank Gilliam, Gordy Morris, Duane Johnson, and Harry Lindsey based upon his belief that these individuals were the most qualified candidates for the job. Howard contends that he and the Selection Committee determined that each of these candidates had superior job knowledge and experience, personal development, communication skills, teamwork skills, personal initiative, safety skills, cooperation skills, customer focus, and innovation. Howard Dec. PP 22, 25.

In response, Plaintiff attempts to establish pretext by arguing that Defendants' reasons are not credible because Plaintiff actually [sic] superior qualifications. First, to establish that he had adequate job knowledge and experience, Plaintiff points to evidence that one of Defendants' employees recommended Plaintiff for a Trainer position in 1992. Plaintiff also points to the testimony of Willard Bell, his direct supervisor, that Plaintiff meets and in some cases exceeds expectations with respect to specific skills in the performance of his job and to his performance evaluation as evidence that Plaintiff actually possessed up-to-date knowledge of his job.

Plaintiff also challenges Defendants' assertion that he was not qualified for the Trainer job because he did not have sufficient skills in overhead lines. Plaintiff contends that because Howard indicated that they would have accepted Plaintiff as either an underground or overhead trainer had he been offered a position, that the successful applicant only needed skills in overhead or underground lines. Howard Dep. at 88-89. However, that Defendants were filling both underground and overhead Trainer positions does not support a finding that Defendants did not believe that a successful applicant needed up-to-date knowledge of both types of work.

Plaintiff also points to Howard's testimony that he did not actively investigate in August 1998 whether Plaintiff's job duties required him to use updated systems or whether Plaintiff had such updated knowledge. Howard Dep. at 83, 156-57. However, Howard testified that, based on information Plaintiff provided during a March 1998 interview for another Trainer opening, Plaintiff's candidate profile, and Plaintiff's performance as a guest trainer, he believed that plaintiff did not have up-to-date knowledge with respect to

overhead line work because Howard knew that Plaintiff had worked exclusively in an underground streetlight cable repair position for the past two years. *Id.* at 48-49, 82-83, 87-88, 93.

Plaintiff also points to his 1999 evaluation, which covers the period during which he applied for this job, in which his communication skills were rated as exceeding requirements and other evidence indicating that he possess good communication skills. Plaintiff also points to evidence that he possesses good teamwork skills and that his evaluation indicated that he "exceeded job requirements" in "safety & security". Pla. Resp. to Def. Mot. S.J., Ex. 15 at G8673.

However, as Defendants note, the performance evaluations cited by Plaintiff are irrelevant because they were not created until after the hiring decision was made. Further, whether Plaintiff was actually qualified for the position goes to whether Plaintiff can establish a *prima facie* case, not to whether there is evidence of pretext. The issue before the Court is whether Plaintiff has produced evidence to contradict that Howard believed that Plaintiff did not meet the selection criteria, not whether Howard's assessment of Plaintiff's qualifications was ultimately correct. *Holifield v. Reno,* 115 F.3d 1555, 1564 (11th Cir. 1997). Howard consistently testified that he believed Plaintiff did not meet the criteria Howard selected to determine who would be interviewed for the position. Plaintiff has produced no evidence to contradict Howard's testimony that he was told by individuals who observed Plaintiff as a guest instructor that Plaintiff had not demonstrated good communication skills. Plaintiff cannot dispute that Howard, the decisionmaker, reasonably believed that Plaintiff had not demonstrated good teamwork skills,

because Howard thought that Plaintiff's underground streetlight cable repair position required Plaintiff to work as an "individual contributor" rather than as a member of a team such as a line crew. Howard Dep. at 53-54, 75, 77. The Court will not second-guess a decisionmaker's assessment of whether an employee is qualified for a particular position. *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

Plaintiff attempts to establish pretext by arguing that the successful candidates did not meet the stated qualifications for the job. Specifically, Plaintiff points to Howard's testimony that "peer credibility" was a factor he considered when deciding whom to interview and promote. Howard Dep. at 42-43. Plaintiff contends that pretext is established by the fact that successful candidate Harry Lindsey did not have such credibility but was awarded a position anyway. To support his contention that Lindsey did not have such credibility, Plaintiff points to Lindsey's performance evaluation, which suggested that Lindsey needed improvement in this area. Pla. Resp. to Def. Mot. S.J., Ex. 19. Plaintiff also contends that Lindsey did not meet the stated requirements of communication skills, job knowledge, and teamwork because his performance evaluation suggested that he needed improvement in these areas. *Id.* However, Plaintiff does not point to any evidence that Howard reviewed Lindsey's performance evaluation at this time; indeed, Defendants' evidence suggests that Howard did not consider Lindsey's performance evaluation in making the interview decision. Howard Dep. at 72, 179. Nor can Plaintiff establish pretext with evidence that Howard and another selection committee member questioned Lindsey's credibility during his interview. The dispositive inquiry is whether Defendants discriminated

against Plaintiff when Howard did not select Plaintiff for an interview. That Howard and another committee member noted concerns about Lindsey's credibility based on events after that decision had been made is irrelevant to Plaintiff's case. Howard Dep. at 174-77.

Plaintiff also contends that two of the interviewed candidates, Chris Jarrard and Joseph Wheeler, did not possess the stated requirement of a minimum of eight years lineman experience. However, Jarrard and Wheeler both had over eight years of combined apprentice lineman and lineman experience at the time they were selected to interview for the position. Pla. Resp. to Def. Mot. S.J., Ex. 28 (Chris Jarrard); Ex. 29 (Joseph Wheeler).

Plaintiff also attempts to establish pretext simply by arguing that he was more qualified than the individuals selected for the Trainer positions. However, as noted above, it is the employer's belief rather than Plaintiff's perceptions about his own performance which are at issue. That Plaintiff possessed more seniority than some of the successful candidates is also insufficient to establish pretext. It is undisputed that seniority was not a factor used in selecting the successful applicants. As Defendants note, longevity and years of service do not necessarily translate into possession of the requisite skills and abilities for a position that requires not only knowledge and expertise, but also communication, instruction, training and teaching.

In sum, Plaintiff contends that the subjective reasons asserted are not credible based on evidence in the record. However, Plaintiff has not come forward with any evidence to establish that the decisionmakers with respect to this position did not actually find that the successful candidates

were better qualified than Plaintiff. Plaintiff's evidence is thus insufficient to permit a reasonable factfinder to conclude that the reasons given by Defendants were a pretext for intentional discrimination.

Further, even if Plaintiff could discredit one of the reasons Howard decided not to interview him, that fact would not establish that Defendants' entire proffered explanation is pretextual. *Chapman v. AI Transp.*, 229 F.3d 1012, 1024-25 (11th Cir. 2000) (holding that employer is entitled to summary judgment unless the plaintiff proffers sufficient evidence to create a genuine issue of material fact regarding whether each of the employer's articulated reasons is pretextual); *see also Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997) (granting summary judgment where plaintiff could not discredit one of employer's three proffered reasons for the challenged promotion decision).

White Co-Workers

Defendants contend that Plaintiff's claim that GPC promoted other less-qualified white employees into supervisory positions instead of him should be dismissed because Plaintiff cannot make a *prima facie* case with regard to this claim. Plaintiff does not respond to this argument and thus is deemed to have abandoned this claim.

B. Pattern and Practice

Finally, Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. Plaintiff has offered only statistical evidence to support his pattern or practice claim. Under the pattern or practice theory, the plaintiff must provide

evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). While "statistics as to [Defendants'] employment policy and practice may be helpful to a determination of whether [Defendants'] refusal to [ ]hire [Plaintiff] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim.

In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support his argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating

procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75 Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern and practice claim is GRANTED.

Accordingly, the Defendants' motion for summary judgment on Plaintiff's individual claims is GRANTED.

SO ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, and CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., and SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

260 F. Supp. 2d 1295; 2003 U.S. Dist. LEXIS 5675

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. § 1981 is presently before the court on all Defendants' motion for summary judgment on the individual claims of Plaintiff Patricia Harris. For the reasons set forth below, Defendants' motion is GRANTED.

I. Facts

The following facts are undisputed unless indicated otherwise. In June 1990, Defendant Georgia Power Company ["GPC"] hired Plaintiff to work on a contract basis as

a Secretary III at a starting salary of $ 22,668.00. On July 1, 1991, after Plaintiff had been working on a contract basis for approximately one year, she was moved to a Senior Secretary position and she became a GPC employee. Between 1993 and 1997, Plaintiff worked for GPC as a Research Analyst in the Competitive Intelligence Department, and subsequently as an Economic Development Analyst in the Economic Research Department.

In or around July 1997, Plaintiff interviewed for a Market Research and Support Analyst position in the Market Research Department of Southern Company Services, Inc. ["SCS"].[1] The interview panel consisted of

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[1] Defendants The Southern Company ["TSC"] and Southern Company Energy Solutions, Inc. ["SCES"] move for summary judgment on the grounds that Plaintiff has never been employed by nor did she ever apply for positions at TSC or SCES. Defendant GPC moves for summary judgment on the ground that Plaintiff's employment with GPC ended prior to time period relevant to this case. Plaintiff has failed to respond to SCES or GPC's motion and is deemed to have abandoned her claims against those entities. *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001).

A plaintiff must be an "employee" to bring a Title VII lawsuit. *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). An "employee" for Title VII purposes is an "individual[] who receives compensation from an employer." *Id.* at 1243. An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). The analysis of whether a party is an employer appears to be the same under Title VII and § 1981. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (noting that these statutes have the same requirements of proof and use the same analytical framework); *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 61 n.2 (D.D.C. 1996); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D.Wis. 1988); *Alie v. NYNEX Corp.*, 158 F.R.D. 239, 245 n.3 (E.D.N.Y. 1994). Thus, Plaintiff has standing to sue TSC only if it can be shown that TSC constituted an "employer" from whom Plaintiff received compensation.

(Continued on following page)

Senior Market Research and Support Analysts Harvey Berman, Hoyt Wagner, and Gene McCloud. Plaintiff also interviewed separately with the manager of SCS's Marketing Research Department, Charles Plunkett. Defendants contend that the interview panel recommended against hiring Plaintiff based on her interviews and her lack of marketing experience or education. According to Defendants, Plunkett went against this recommendation and offered Plaintiff a Market Research and Support Analyst I position even though, given her limited work experience and her lack of any relevant educational background, he believed that she was only minimally qualified for the position.

Defendants contend that Plaintiff, as the most junior Market Research and Support Analyst, was responsible for completing projects and other tasks assigned by Plunkett and the employees holding the Market Research and Support Analyst Senior positions. Plaintiff attended several courses and seminars related to her duties as a Market Research and Support Analyst I. In fact, Plaintiff took more training courses than any other employee in the Department.

It is undisputed that TSC is a holding company which owns the stock of all other Defendants named in the complaint but has no employees. Womack Aff. P 9. Plaintiff asserts that Defendants, including TSC, created SCS as a company-wide human resources department and use SCS's "extensive involvement in personnel policy-making and employee selection processes" to maintain "substantial involvement in GPC's personnel decisions." Plaintiff fails to point to any facts in the record to support these allegations. *See Wood v. Southern Bell Telephone and Telegraph Co.*, 725 F. Supp. 1244, 1249-50 (N.D.Ga. 1989). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to TSC, SCES and GPC.

During her tenure, Plunkett awarded Plaintiff some of the highest percentage salary raises in the Department. In March of 1998, eight months after her promotion, Plunkett awarded Plaintiff a 4.2% merit raise and her base salary increased to $ 44,386.56. In March of 1999, Plunkett awarded Plaintiff a 4.9% merit raise and her base salary increased to $ 46,594.56. Plunkett also awarded Plaintiff a 15% incentive bonus, which was the highest percentage incentive bonus in the Department. Beginning with her promotion, Plunkett had increased Plaintiff's salary by more than 18%.

On August 13, 1999, Plaintiff resigned her employment and sent an unsolicited email to her co-workers which stated, in part:

> After nearly 10 years, my last day with the Southern Company will be Friday, August 13, 1999. I look back and I am in awe of how God has placed the most wonderful people and opportunities in front of me and placed them within one company – the Southern Company. I am definitely "the better for it" for having experienced the Southern Style. . . . Thank you for the opportunities.

Pla. Dep. Ex. 38. Plaintiff also sent a resignation letter to Plunkett which stated, in part:

> I have had the opportunity to work within the Southern Company system since 1990. My experience at Southern has enriched me deeply. . . . I am grateful for the positive experiences and relationships developed over the years at Southern.

Plaintiff Dep. Ex. 39. Plaintiff admits she meant what she stated in this letter.

On or about January 4, 1999, Plunkett hired John Dennis Page as a Market Research and Support Analyst II. In or around November 8, 1999, Plunkett hired Darin Klein as a Market Research and Support Analyst I. Plunkett hired Rebekah Golden as a Market Research and Support Analyst I at approximately the same time as Klein, and she began working as an SCS employee on or about November 1, 1999.

This lawsuit was filed on July 27, 2000; Plaintiff joined as a named party when the Second Amended Complaint was filed on August 14, 2000. In the complaint, Plaintiff alleges that Defendants discriminated against her by paying her less than her white co-workers and by denying her promotions. Plaintiff also claims that Defendants discriminated against her by denying her training opportunities and support.

II. Defendants' Motion for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendant] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). To prevail in their motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). If Defendants make a sufficient showing, then

Plaintiff "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Fed.R.Civ.P. 56(e)).

Under Title VII, an employer may be found liable for unlawful discrimination under any one of three discrete theories: disparate treatment discrimination, pattern and practice discrimination, or disparate impact discrimination. *EEOC v. Joe's Stone Crab*, 220 F.3d 1263,1273 (11th Cir. 2000).[2] The first two theories require proof of discriminatory intent, while the third does not. *Id.* at 1273. Defendants argue that summary judgment is appropriate here because Plaintiff has failed to establish a claim of intentional discrimination or disparate impact. Plaintiff objects, arguing that there are genuine issues of material fact precluding summary judgment as to both Plaintiff's intentional discrimination and disparate impact claims. Because the theories place different burdens on the parties, the Court will address them separately.

A. Intentional Discrimination

To establish a prima facie case of race discrimination under a disparate treatment theory, Plaintiff may offer either direct or circumstantial evidence of discriminatory intent. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973);

[2] Section 1981 provides a cause of action only for claims of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976); *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999).

Alexander v. Fulton County, Ga., 207 F.3d 1303 (11th Cir. 2000). If the plaintiff presents direct evidence of discrimination, the defendant is then required to prove by a preponderance of the evidence that it would have taken the adverse employment action even in the absence of discrimination.

If the plaintiff provides sufficient circumstantial evidence to support a prima facie case, a legal presumption of unlawful discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802-03. The defendant's burden is "exceedingly light" and is "one of production, not proof." *Id.* at 802. If the defendant satisfies its burden, the presumption of discrimination is eliminated and the plaintiff must be given an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant is a pretext for discrimination. *Id.*

A plaintiff may also use statistical evidence to establish either a prima facie case of discrimination or pretext. *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 952 (11th Cir. 1991). Statistics may be used to establish an individual plaintiff's claim that a pattern or practice of discrimination existed, or simply to bolster the plaintiff's circumstantial evidence of individual disparate treatment. Under the pattern and practice theory, the plaintiff must provide evidence sufficient to establish that impermissible discrimination was the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75, 1286-87 (internal quotation marks and citation omitted). Even if the statistical evidence is insufficient to meet this standard, evidence establishing a discriminatory pattern "is

probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." *Parker v. Burnley*, 693 F. Supp. 1138, 1153 (N.D.Ga. 1988) (internal quotation marks and citation omitted). Whether the plaintiff argues that the statistical evidence supports a pattern or practice claim or simply constitutes evidence of disparate treatment, "the ultimate inquiry remains whether the plaintiff has demonstrated that the defendant intentionally discriminated in refusing to enter into a contractual relationship." *Brown*, 939 F.2d at 952 (11th Cir. 1991) (citing *Grigsby v. Reynolds Metal Co.*, 821 F.2d 590, 595 (11th Cir. 1987)).

1. Individual Disparate Treatment

Promotion Discrimination

In the complaint, Plaintiff alleges that Defendants discriminated against her by refusing to promote her. Defendants argue in the motion for summary judgment that Plaintiff abandoned this claim after the close of discovery but fail to indicate specifically how or when this alleged abandonment occurred. While it is therefore unclear that Plaintiff in fact abandoned this claim prior to Defendants' motion for summary judgment, Plaintiff did not make any claims with respect to promotion discrimination in her response to Defendants' summary judgment motion. Defendants are therefore entitled to summary judgment on this claim. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp. 2d 1301, 1329 (N.D.Ga. 2001). Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's promotion claim.

Discrimination in Training and Support

Plaintiff also alleges in the complaint that Defendants discriminated against her by denying her request to participate in a specific training course. Defendants argue that they are entitled to summary judgment because Plaintiff has failed to establish a prima facie case of disparate treatment. Plaintiff did not address this argument in her response to Defendants' motion for summary judgment. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's claim of discrimination in training and support. *Resolution Trust Corp.*, 43 F.3d at 599; *Hudson*, 209 F. Supp. 2d at 1329.

Compensation Discrimination

Plaintiff claims that Defendants discriminated against her by paying her less than similarly situated white employees. To make out a prima facie case of compensation discrimination, Plaintiff must establish the following four elements: 1) that she is a member of a protected class; 2) that she received low wages; 3) that similarly situated persons outside the protected class received higher wages; and 4) that she was qualified to receive the higher wages. *MacPherson v. University of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (applying the test in an age discrimination case). Defendants do not dispute that Plaintiff is a member of a protected class or that she received low wages but argue that they are entitled to summary judgment on this claim because Plaintiff has failed to establish that she was similarly situated to any of her white co-workers who received higher pay or that she was qualified to receive such higher pay.

"In a comparator analysis, the plaintiff is matched with a person or persons who have very similar job-related characteristics and who are in a similar situation to determine if the plaintiff has been treated differently than others who are similar to him." *Id.* Plaintiff indicated in a discovery response that she is similarly situated to several white coworkers who held the Market Research and Support Analyst I position and were paid more than she: Tracey Helinick, Kathryn Albus, Diane Cunningham, Wilbur Blackman, Jr., Darin W. Klein, Rebekah Golden, and John Page.[3] Defendants argue that none of these employees are proper comparators.

In her response to Defendants' motion for summary judgment, Plaintiff does not dispute that Helmick and Albus are not proper comparators. Nor are Cunningham and Blackman proper comparators. Although Cunningham and Blackman, like Plaintiff, occupy the Market Research and Support Analyst I position, Cunningham and Blackman work in the Load Research Department while Plaintiff works in the Market Research Department. Defendants have provided evidence to establish that the

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[3] In her response to Defendants' motion for summary judgment, Plaintiff argues that she can also establish compensation discrimination using the Market Research and Support Analyst Seniors as comparators. Plaintiff contends that she was hired to fill a Senior level position but that Defendants discriminated against her by placing her in a Level I rather than Senior position. Plaintiff's supervisor Plunkett testified that he placed Plaintiff in the Level I position based on her relative skills and education. Plaintiff does not dispute that she did not negotiate for a higher base salary and accepted Defendants' initial offer for the new position. Plaintiff has provided no evidence to establish that she was performing the same functions as the analysts at the Senior level and thus cannot establish that the Senior analysts are proper comparators.

skills and responsibility required of analysts in the Load Research Department varies considerably from those required in the Marketing Research Department. While Plaintiff contends that Cunningham and Blackman perform functions similar to hers, she points to no evidence to support this argument.

Klein, Golden and Page, however, all occupy the Market Research and Support Analyst I position in the Marketing Research Department with Plaintiff. While Defendants have produced evidence to suggest that Klein performed some tasks that the other analysts did not, this evidence is insufficient to establish that the other analysts were performing jobs which require skills, efforts and responsibility that were not substantially equal to Plaintiff's. It is undisputed that Klein, Golden and Page earned more than Plaintiff during the period in question. Thus, Plaintiff has established that similarly situated persons outside the protected class received higher wages.

Defendants next argue that Plaintiff was not qualified to receive the higher wage because she did not have the professional experience or formal education possessed by Klein, Golden and Page. Plaintiff, who has a masters degree in business administration from the Keller School of Management at the DeVry Institute, began working as a Market Research and Support Analyst I in 1997. Although Defendants contend that Plaintiff had little or no marketing experience at that time, Plaintiff has provided evidence to support her contention that she gained marketing experience in the positions held at GPC from 1993 through 1997. Plaintiff received positive evaluations during the period in question and her performance was frequently praised; such evidence indicates that Plaintiff performed her job well and thus was at least arguably qualified to

receive wages comparable to those received by the other analysts.

However, that Plaintiff did not have the same professional experience or education as the other analysts provides Defendants' legitimate, non-discriminatory reason for Plaintiff's lower wages. When Plaintiff accepted the Market Research and Support Analyst I position, Plunkett offered Plaintiff a salary of $ 42,586.56, which was an 8% increase over her prior salary of $ 39,432.00. Defendants contend that Plunkett believed that this salary was appropriate based on Plaintiff's work history and educational background. Plaintiff neither sought to negotiate for a higher salary nor offered any justification why she should receive a higher salary.

In contrast, Defendants' evidence shows that Klein earned bachelor, masters and doctorate degrees from the University of Pennsylvania and that he had specialized in communications and research. Klein taught for over ten years at the University of Pennsylvania and at Georgia State University and had performed market research functions for a local advertising agency. Golden has a bachelor's degree and more than six years of experience in market research, holding such positions as Project Director of Marketing, Supervisor of Marketing Research, and Marketing Research Coordinator for Cox Communications. Page has a bachelor's degree in business and marketing from Winthrop University and a master's degree in marketing research from the University of Georgia. Page also worked for six months as a Market Research Management intern with Bellsouth Communications.

Plaintiff attempts to establish pretext by arguing that alleged variations in professional experience and education do not justify her lower salary. The proper pretext analysis is whether Plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997). Plaintiff first asserts that Klein's experience and education do not justify his higher salary because his work experience was primarily academic. Plaintiff then argues that Golden's higher salary is not justified because Golden had only a bachelor's degree while Plaintiff holds a master's degree. With respect to Page, Plaintiff argues that his education and professional experience do not justify his higher salary because Page, a recent graduate, had never held a full-time marketing position. Plaintiff also argues with respect to all three comparators that because she and they were placed in the same position within the same departments, the variations in experience and education are not significant enough to justify her lower salary.

However, Plaintiff's own opinion about these differences in qualifications does not give rise to a material fact dispute. Plaintiff has provided no evidence to establish that Defendants did not actually value the education and professional experiences of the other analysts more than Plaintiff's. Plaintiff cannot establish pretext merely by suggesting that, in her judgment, the other analysts were not as qualified as she. *Id.* at 1253 (noting that a plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the

employer's reasons where the reason is one that might motivate a reasonable employer).

Plaintiff asserts that pretext is also established by the testimony of other black employees in the Department that they were discriminated against by Defendants. Specifically, Plaintiff offers the sworn statements of two black employees who claim that Defendants denied them advancement opportunities and compensation comparable to that received by white employees. These statements contain conclusory, generalized allegations with few specific facts and Plaintiff provides no documentation to support the few facts alleged. These affidavits are simply insufficient by themselves to allow a reasonable factfinder to determine that Defendants' legitimate reason for Plaintiff's compensation is actually a pretext for discrimination. *See id.* at 1528.

Plaintiff has also provided statistical evidence of racial imbalances in Defendants' compensation practices as evidence of pretext. Specifically, Plaintiff has offered statistical reports to support her claim that Defendants' compensation practices had a discriminatory effect on black employees. Plaintiff argues that the reports of her expert, Dr. Madden, which find statistically significant disparities in the compensation of black employees relative to white employees, are evidence from which a reasonable factfinder could determine that intentional discrimination occurred. Defendants contend that Plaintiff's generalized statistics are insufficient to support Plaintiff's claims of intentional discrimination.

As the Supreme Court has noted, while statistical evidence may allow the District Court to "determine . . . that the (racial) composition of defendant's labor force is

itself reflective of restrictive or exclusionary practices . . . such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *McDonnell Douglas*, 411 U.S. at 805 n. 19 (internal quotation marks and citation omitted). In this case, Plaintiff's statistical evidence is insufficiently specific to support her individual claims.

Plaintiff's statistics compare the compensation rate of employees within the same pay grade who perform similar job functions; however, these statistics generally fail to compare similarly situated individuals, significantly diminishing the probative value of any disparity. For example, Plaintiff's statistics do not account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation decisions. Plaintiff does not provide statistics comparing employees with equivalent work experience in specific job categories or job progressions. Plaintiff relies instead on a statistical analysis of a company-wide data pool and makes no attempt to narrow the data pool to the locations or specific position in which she worked. As this Court noted in the order denying class certification, the probative value of Plaintiff's statistical evidence is therefore highly questionable, in significant part due to the treatment of factors such as experience, education and specific promotion processes. *Cooper v. Southern Company*, 205 F.R.D. 596, 613-14 (N.D.Ga. 2001).

The analytical deficiencies of Plaintiff's statistics diminish the probative value of this evidence such that it cannot by itself support a claim of disparate treatment. *See Brown v. American Honda Corp.*, 939 F.2d 946, 952

(11th Cir. 1991) (holding that summary judgment was appropriate where plaintiff's statistical evidence, which lacked specific analytical foundation and thus failed to show that employer maintained discriminatory intent, was insufficient to establish prima facie case or pretext); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 985 (11th Cir. 1989) (holding that plaintiff's statistical evidence failed to establish prima facie case or pretext where evidence failed to make specific analytical comparisons); cf. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977)[4] (holding that plaintiff's evidence of statistical disparities in hiring, promotion and compensation was sufficient to support claim of intentional discrimination, where the employment decisions were based on completely subjective criteria).

Because Plaintiff has failed to provide any evidence of pretext, Defendants are entitled to summary judgment on Plaintiff's compensation claim. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's compensation claim.

2. Pattern and Practice

Plaintiff has failed to create a genuine issue of material fact as to whether a pattern or practice of discrimination existed. As discussed above, Plaintiff has provided statistical evidence in an attempt to establish a claim of pattern and practice discrimination. While "statistics as to [Defendants'] employment policy and practice may be

[4] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

helpful to a determination of whether [Defendants'] [employment decision] in this case conformed to a general pattern of discrimination against blacks," *McDonnell Douglas*, 411 U.S. at 805, to have probative value, statistical evidence must be tailored to the appropriate types of decisions and specific populations involved. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-55, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1312 (11th Cir. 1999). The analytical deficiencies of Plaintiff's statistical evidence, discussed above, render this evidence insufficient to support a pattern or practice claim. In addition to Plaintiff's expert reports, Plaintiff offers Defendants' internal personnel documents to support her argument that Defendants maintained a pattern or practice of compensation discrimination. While these documents indicate some disparity in compensation between black and white employees, these documents are not probative as to whether Defendants intentionally discriminated against Plaintiff during the period in question. The documents indicate average salaries of employees divided by racial classification but do not control for factors such as education, experience or skill level and thus cannot prove that Defendants discriminated on the basis of race. Plaintiff has thus failed to come forward with evidence sufficient to prove that intentional discrimination was Defendants' "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1274-75. Accordingly, Defendants' motion for summary judgment with respect to Plaintiff's pattern and practice claim is GRANTED.

B. Disparate Impact

Finally, Defendants argue that Plaintiff has failed to establish a claim of disparate impact under Title VII. Because 42 U.S.C. § 1981 provides a cause of action only for claims of intentional discrimination, disparate impact claims must be brought under Title VII. This Court has already determined that Plaintiff does not have standing to pursue claims under Title VII in this case under the applicable statute of limitations. *Cooper*, 205 F.R.D. at 606. Plaintiff does not address her disparate impact claim in her response to Defendants' motion for summary judgment. Accordingly, Defendants' motion for summary judgment is GRANTED with respect to Plaintiff's disparate impact claim.

For the reasons stated above, Defendants' motion for summary judgment on Plaintiff's individual claims is GRANTED.

SO ORDERED, this 31 day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, AND CAROLYN WILSON, Plaintiffs v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., AND SOUTHERN COMPANY ENERGY SOLUTIONS, INC. Defendants

CIVIL ACTION NO. 1:00-CV-2231-ODE C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

213 F.R.D. 683; 2003 U.S. Dist. LEXIS 5460

March 31, 2003, Decided
March 31, 2003, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This civil matter alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 is presently before the court on the following motions: Plaintiffs' motion to compel production of numerous reports, data, analyses, and documents; Defendants' motion to compel production of interrogatories and all requested documents; Defendants' motion to exclude any evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information; Plaintiffs' motion for fees and costs; Plaintiffs' motion for leave to file a supplemental response

to Defendants' motion to exclude evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information; Defendants' motion to sever, or in the alternative, for separate trials; Defendants' motion to strike exhibits contained in the Plaintiffs' responses to Defendants' motions for summary judgment; Defendants' motion to strike certain affidavits contained in Plaintiffs' responses to Defendants' motions for summary judgment; Defendants' motion to strike the declaration of John Del Roccili, contained in Plaintiffs' responses to Defendants' motions for summary judgment; Plaintiffs' motion for leave to file surreplies to address new arguments in Defendants' reply memoranda; Plaintiff Edwards' motion to strike Defendants' reply brief, or in the alternative, for leave to file a response to the newly raised arguments; and Plaintiffs' motion to strike Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply briefs.

The facts of this case are set out more fully in this Court's October 11, 2001 order denying class certification. A brief summary of the relevant facts follows. The seven named Plaintiffs filed this action alleging discrimination in employment based on race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 on July 27, 2000. After the Court denied Plaintiffs motion for class certification, Defendants filed motions for summary judgment on the individual claims of each of the named Defendants. In separate orders, this Court grants Defendants' motions for summary judgment on all Plaintiffs' claims. For the reasons stated below, Plaintiffs' motion to compel production of numerous reports, data, analyses, and documents is DENIED;

Defendants' motion to compel production of interrogatories and all requested documents is DENIED as moot; Defendants' motion to exclude any evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information is DENIED as moot; Plaintiffs' motion for fees and costs is DENIED; Plaintiffs' motion for leave to file a supplemental response to Defendants' motion to exclude evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information GRANTED; Defendants' motion to sever, or in the alternative, for separate trials is DENIED as moot; Defendants' motion to strike exhibits contained in the Plaintiffs' responses to Defendants' motions for summary judgment is DENIED; Defendants' motion to strike certain affidavits contained in Plaintiffs' responses to Defendants' motions for summary judgment is DENIED; Defendants' motion to strike the declaration of John Del Roccili, contained in Plaintiffs' responses to Defendants' motions for summary judgment is GRANTED; Plaintiffs' motion for leave to file surreplies to address new arguments in Defendants' reply memoranda is GRANTED; Plaintiff Edwards' motion to strike Defendants' reply brief is DENIED but the motion for leave to file a response to the newly raised arguments is GRANTED; and Plaintiffs' motion to strike Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply briefs is DENIED.

Plaintiffs' motion to compel production of numerous reports, data, analyses, and documents

Plaintiffs seek to compel the production of various reports, data, analyses and documents relating to Defendants' employment policies. Upon a full review of the

record, the Court finds that Plaintiffs have failed to provide sufficient justification in their briefs for the motion to compel. The court therefore DENIES Plaintiffs' motion to compel.

Defendants' motion to compel production of interrogatories and all requested documents

In their motion, Defendants seek to compel Plaintiff Cooper's response to specific interrogatories and Plaintiffs Patricia Harris, Sarah Jean Harris and Michael Edwards' production of specific documents. Because the Court grants Defendants' motions for summary judgment on all Plaintiffs' claims, Defendants' motion to compel is DENIED as moot.

Defendants' motion to exclude any evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information

In this motion, Defendants seek to exclude evidence relating to Plaintiffs' medical conditions. Because the Court grants Defendants' summary judgment motions, the motion to exclude is DENIED as moot.

Plaintiffs' motion for fees and costs

In this motion, Plaintiffs seek an order under Federal Rule of Civil Procedure 37(b) awarding Plaintiffs their costs and fees associated with responding to Defendants' motion to compel. Under Rule 37(a)(4)(B), "if the motion is denied, the court . . . shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred

in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." In their reply brief, Defendants raise arguments suggesting that the motion to compel was substantially justified. However, because the Court grants Defendants' motions for summary judgment and denies Defendants' motion to compel as moot, the Court does not decide the motion to compel on the merits. Accordingly, Plaintiffs' motion for costs and fees is DENIED.

Plaintiffs' motion for leave to file a supplemental response to Defendants' motion to exclude evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information

Plaintiffs contend that a supplemental response is necessary to respond to new issues raised in Defendants' reply brief. Plaintiffs' motion for leave to file a supplemental response is GRANTED.

Defendants' motion to sever or in the alternative for separate trials

Because the Court granted Defendants' motions for summary judgment on all of Plaintiffs' claims, Defendants' motion to sever is DENIED as moot.

Defendants' motion to strike exhibits contained in the Plaintiffs' responses to Defendants' motions for summary judgment

Defendants have filed a motion to strike this evidence, arguing that it is inadmissible because it is unauthenticated and constitutes inadmissible hearsay. However, this

argument is unavailing because there is no requirement that evidence be presented in admissible form at summary judgment as long as the evidence would be admissible at trial. *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996). The evidence at issue would likely be admissible at trial. *See e.g.*, 31 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 7105 (2000) ("Authentication can also be accomplished through judicial admissions such as . . . production of items in response to . . . [a] discovery request."); F.R.E. 803(6) (hearsay exception for business record); F.R.E. 801(d)(2)(D) (admission by party opponent does not constitute hearsay); F.R.E. 806 (hearsay exception for purposes of impeachment). In any case, because the Court finds that Plaintiffs' evidence, including the challenged exhibits, failed to create genuine issues of fact, Defendants' motion to strike is DENIED as moot.

Defendants' motion to strike certain affidavits contained in Plaintiffs' responses to Defendants' motions for summary judgment

Defendants move to strike certain affidavits submitted by Plaintiffs in support of Plaintiffs' opposition to Defendants' motions for summary judgment. The Court is inclined to agree with Defendants' argument that at least some of the challenged provisions fail to meet the requirements for affidavits submitted under Federal Rule of Civil Procedure 56. However, because the Court found that Plaintiffs' evidence, including the challenged affidavits, failed to create genuine issues of fact, Defendants' motion to strike is DENIED as moot.

Defendants' motion to strike the declaration of John Del Roccili contained in Plaintiffs' responses to Defendants' motions for summary judgment

Also pending is Defendants' Motion to Strike the Declaration of John Del Roccili. Defendants move to strike Del Roccili's declaration filed by Plaintiff in support of their opposition to Defendants' motions for summary judgment – in its entirety, alleging that the declaration is inadmissible because it does not meet the requirements for expert testimony and because the declarant lacks personal knowledge of the facts asserted as required under Federal Rule of Civil Procedure 56(e). In response, Plaintiff contends that the declaration does not constitute expert testimony and that the declaration otherwise meets the requirements of Rule 56. For the reasons stated below, Defendants' motion is granted.

The declaration, attached by Plaintiffs to each of their responses to Defendants' motions for summary judgment on the individual claims of each Plaintiff, purports to summarize information extracted from Defendants' human resources databases. According to Plaintiffs, the report does not constitute expert testimony because it does not contain expert opinion or analysis but only the declarant's summary of factual information produced by Defendants. It is true that the bulk of the report constitutes factual statements related to Plaintiffs' employment histories. However, at least three paragraphs purport to provide the results of the declarant's analysis of various facts. Del Roccili Dec. P 33 (reporting results of an analysis as to whether black employees were moved to lower pay grade level position but not compensated at the maximum salary in the lower pay grade range); *id.* at P 41 (analysis to determine the number of instances in which white employees received

a "new job" promotion and were awarded a 9% or higher salary increase); *id.* at P 48 (analysis to determine the statistical probability that none of the black applicants would be interviewed for a specific position).

The declaration is inadmissible as expert testimony because it is untimely and fails to comport with the requirements of Federal Rule of Civil Procedure 26(a)(2) and Local Rule 26.2(C). Fed R. Civ. P. 26(a)(2); Local Rule 26.2(C), N.D. Ga. The local rule provides:

> Any party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert and, if desired, to name its own expert witness sufficiently in advance of the close of discovery so that a similar discovery deposition of the second expert might also be conducted prior to the close of discovery.
>
> Any party who does not comply with the provisions of the foregoing paragraph shall not be permitted to offer the testimony of the party's expert, unless expressly authorized by court order based upon a showing that the failure to comply was justified.

Local Rule 26.2(C), N.D. Ga.

Rule 26(a)(2) requires a party to identify any expert witnesses and disclose a statement of the intended testimony and its basis as directed by the court. Fed. R. Civ. P. 26(a)(2). The disclosure rule is enforced through Rule 37(c)(1), which provides that a "party that without substantial justification fails to disclose information required by [Rule 26] shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on

a motion any witness or any information not so disclosed." Fed. R. Civ. P. 37(c)(1). Plaintiffs do not contest that they failed to provide a statement summarizing Del Roccili's testimony but argue that such summary was not required because the declaration does not constitute expert testimony.

However, Del Roccili's declaration also fails to meet the requirements for fact testimony submitted in declaration form. A declaration made under penalty of perjury may be submitted in lieu of an affidavit. 28 U.S.C. § 1746. Declarations, however, are subject to the same requirements as affidavits submitted under Federal Rule of Civil Procedure 56(e). *See AirTran Airlines Inc. v. Plain Dealer Pub. Co.*, 66 F. Supp.2d 1355, 1361 (N.D. Ga. 1999). Rule 56 provides that affidavits filed in support of a motion for summary judgment "shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e). A court, however, may only strike the inadmissible portions, and will consider the admissible portions. *See Lee v. Nat'l Life Assurance Co. of Canada*, 632 F.2d 524, 529 (5th Cir. 1980);[1] *Webster v. Fulton County*, 44 F. Supp.2d 1359, 1372 (N.D. Ga. 1999). "Rule 56(e)'s personal knowledge requirement prevents statements in affidavits that are based, in part, 'upon information and belief' – instead of only knowledge – from raising genuine issues of fact sufficient to defeat summary judgment." *Pace v. Capobianco*, 283 F.3d 1275, 1278 (11th Cir. 2002). In the declaration, Del Roccili makes the following disclosure:

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[1] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

> I have been asked by plaintiffs [sic] counsel to examine or to have someone examine under my supervision the data that has been produced in discovery by the defendants [sic] companies ("SoCo") and report information relating to the individual plaintiffs as identified below. It is my understanding that the data I have received are extracted from SoCo's human resources databases. . . . I declare that the following paragraphs accurately cite and reflect data contained within the databases I have received from SoCo.

Del Roccili Dec. PP 2-3. That Del Roccili does not have personal knowledge of the facts to which he attests – that documents from Defendants' databases contain the information he reports in his declaration – precludes the consideration of his declaration in deciding Defendants' motion for summary judgment. Accordingly, Defendants' motion to strike is GRANTED.

Plaintiffs' motion for leave to file surreplies to address new arguments in Defendants' reply memoranda

In this motion, Plaintiff [sic] argue that they should be allowed to file sur-replies to Defendants' reply briefs filed in support of their motions for summary judgment. Plaintiffs' motion is GRANTED.

Plaintiff Edwards' motion to strike Defendants' reply brief, or in the alternative, for leave to file a response to the newly raised arguments

In this motion, Plaintiff Edwards seeks to strike Defendants' reply brief filed in support of Defendants motion for summary judgment on Plaintiff Edwards' claims. Plaintiff argues that Defendants' reply brief

contains new arguments that Defendants failed to address in their motion for summary judgment. Upon a full review of the record, the Court finds that an order striking the motion is unwarranted and Plaintiff Edwards' motion to strike is therefore DENIED. However, Plaintiff Edwards' motion for leave to file a response to newly raised arguments is GRANTED.

Plaintiffs' motion to strike Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply briefs

In this motion, Plaintiffs seek an order striking Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply brief. Upon a full review of the record, the Court finds that an order striking the motion is unwarranted and Plaintiffs' motion to strike is therefore DENIED.

Accordingly, for the reasons stated above, Plaintiffs' motion to compel production of numerous reports, data, analyses, and documents is DENIED; Defendants' motion to compel production of interrogatories and all requested documents is DENIED as moot; Defendants' motion to exclude any evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information is DENIED as moot; Plaintiffs' motion for fees and costs is DENIED; Plaintiffs' motion for leave to file a supplemental response to Defendants' motion to exclude evidence relating to Plaintiffs' medical or psychological conditions, or in the alternative, to compel production of that information is GRANTED; Defendants' motion to sever, or in the alternative, for separate trials is DENIED as moot; Defendants' motion to strike exhibits contained in the Plaintiffs' responses to

Defendants' motions for summary judgment is DENIED as moot; Defendants' motion to strike certain affidavits contained in Plaintiffs' responses to Defendants' motions for summary judgment is DENIED as moot; Defendants' motion to strike the declaration of John Del Roccili, contained in Plaintiffs' responses to Defendants' motions for summary judgment is GRANTED; Plaintiffs' motion for leave to file surreplies to address new arguments in Defendants' reply memoranda is GRANTED; Plaintiff Edwards' motion to strike Defendants' reply brief is DENIED but the motion for leave to file a response to the newly raised arguments is GRANTED; and Plaintiffs' motion to strike Defendants' responses to Plaintiffs' statement of disputed facts contained in Defendants' reply briefs is DENIED.

All matters in this case having been ruled upon, the Clerk is directed to enter judgment for Defendants, with each side to bear its own costs.

SO ORDERED, this 31st day of March, 2003.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

CORNELIUS COOPER, MICHAEL EDWARDS, CHARCELLA GREEN, PATRICIA HARRIS, SARAH JEAN HARRIS, IRENE MCCULLERS, and CAROLYN WILSON, Individually and as Class Representatives, Plaintiffs, v. SOUTHERN COMPANY, GEORGIA POWER COMPANY, SOUTHERN COMPANY SERVICES, INC., and SOUTHERN COMPANY ENERGY SOLUTIONS, INC., Defendants.

CIVIL ACTION NO. 1:00-CV-2231-ODE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

205 F.R.D. 596; 2001 U.S. Dist. LEXIS 16809

October 11, 2001, Decided
October 11, 2001, Filed

OPINION BY: ORINDA D. EVANS

OPINION:

ORDER

This putative class action alleging discrimination in employment based on race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981 ("Section 1981") is presently before the Court on Plaintiffs' motion for class certification. The motion includes a request for an evidentiary hearing.

Both sides have filed designations of the evidence they would present if an evidentiary hearing were held. The Court has reviewed the designations, and finds the referenced evidence is already substantially included in the voluminous record, including appendices of documents,

affidavits and deposition excerpts which have been reviewed by the Court. An evidentiary hearing is not needed. Thus, Plaintiffs' request for an evidentiary hearing is DENIED.

After reviewing the record and the briefs filed by both sides, Plaintiffs' motion for class certification is DENIED for the reasons stated below.

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VIII SUMMARY

I. INTRODUCTION

This is an action brought by seven present or past employees of the various Defendants seeking to represent a class of all African-American employees of Defendants, including upper and middle management level employees, office and clerical staff, commission-paid sales personnel, and unionized operations, maintenance and construction personnel.

Pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, Plaintiffs request certification of the following class:

> All African-American persons employed by Southern Company's Corporate Office, Georgia Power Company, Southern Company Services, Inc. or Southern Company Energy Solutions, Inc., in the United States at any time from July, 1998 to the present, who are subject to the Defendants' employment, personnel and human resources policies and practices and who have

> been, continue to be, or may in the future be adversely affected by the Defendants' racially discriminatory employment policies and practices ("the Class").

(Plaintiffs' motion for class certification, pp. 1-2; Complaint). The proposed class encompasses approximately 2,400 people.

Plaintiffs' Third Amended Complaint ("Complaint") alleges discrimination in promotions compensation, training and evaluations, and requests back pay, compensatory damages, punitive damages, declaratory relief,[1] and injunctive relief.[2] The Named Plaintiffs allege various acts of racial discrimination by Defendants at Defendants' locations in the metropolitan Atlanta, Georgia area. The prospective class members reside in Georgia, Alabama, Florida, and Mississippi.

II. THE DEFENDANTS

Defendant Southern Company ("TSC") is a holding company which owns the stock of all other Defendants named in the complaint. TSC has no employees. (Womack Aff., P 9).[3] Plaintiffs allege that TSC has 26,000 employees in the United States; presumably this was the number of

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[1] The Complaint seeks a declaration that "Defendants' acts and practices as set forth herein are in violation of the laws of the United States."

[2] The Complaint requests "preliminary and permanent injunctive relief to end Defendants' discriminatory practices and to prevent current and future harm to the Named Plaintiffs and the Class."

[3] Christopher Womack is the Senior Vice President of Human Resources for Defendant Southern Company Services, Inc. ("SCS").

individuals employed by TSC's subsidiaries in the United States when the complaint was filed.

Defendant Georgia Power Company ("GPC") is the largest subsidiary of Defendant Southern Company and is the nation's largest generator of electricity. (Complaint, P 17). It serves customers in 153 of Georgia's 159 counties. It employs approximately 9,000 employees at different locations throughout Georgia. GPC's headquarters is in Atlanta, Georgia. GPC is divided into five business units: (1) Customer Operations; (2) Marketing; (3) Finance; (4) External Affairs (including Governmental and Regulatory Affairs, Community and Economic Development, Environmental Affairs, Land Management, Risk Management and Public Relations); and (5) Corporate Relations. *Id.* at PP 9-20. GPC also has employees working in GPC's fossil fuel, hydro-electric and nuclear power generating plants which are operated by Southern Company Generation ("SCG").[4] The majority of GPC's employees work in generating plants throughout the state of Georgia.

GPC has a collective bargaining agreement ("CBA") with the International Brotherhood of Electrical Workers ("IBEW"), Local No. 84, which covers forty-four percent of its employees. Over two-thirds of GPC's union workforce is in maintenance/construction or in operations. Fifteen percent of GPC's employees covered by the CBA have

[4] SCG is an independent business unit of TSC which has a sub-organization for each operating company. SCG manages the generation of electricity at GPC's generating plants. All employees working at those plants are employees of GPC, but they are supervised by SCG managers.

college degrees. About twenty-two percent of the covered employees are African-American.[5]

Defendant Southern Company Services ("SCS") has contracted with TSC and each of its subsidiaries to furnish human resources and EEO functions for them. SCS employs approximately 3,000 employees in Georgia and Alabama. SCS is not unionized. (Lightfoot, P 14).[6] Eighty-four percent of SCS' employees are in positions exempt from the requirements of the Fair Labor Standards Act. Seventy-five percent of SCS' exempt employees hold college degrees. Thirty-six percent of the exempt employees hold engineering degrees and twenty-four percent have graduate degrees.

Defendant Southern Company Energy Solutions ("SCES") is a non-regulated, non-utility subsidiary of Defendant TSC which develops and sells energy-related products and services. At the time the instant suit was filed, SCES had approximately 268 employees in Georgia, Alabama, Florida, and Mississippi. (Haworth Aff., P 8).[7] Fifty-three percent of SCES' employees are in exempt

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[5] Plaintiffs' brief, p. 12, states that about one-half of Defendants' covered workforce is African-American, citing Plaintiffs' Exhibit 21. This appears to be an incorrect interpretation of the Exhibit. According to the report of Dr. Haworth, p. 11, 21.9% are African-American. Either way, a substantial part of the class Plaintiffs seek to have certified is covered by the CBA.

[6] Henry Lightfoot is the Manager of Labor Relations at Defendant GPC.

[7] Dr. Joan G. Haworth is a labor economist and econometrician retained by Defendants to conduct economic and statistical analyses of Defendants' employment policies as well as Plaintiffs' claims of discrimination.

positions. Most of SCES' employees sell energy-related products and are commission paid.

The Defendants maintain a common job, salary, or pay grade system[8] which was formulated by Defendant SCS for non-exempt employees (grades NE1 through NE9) and exempt employees (grades E1 to E15). Salaries for covered employees are determined by the CBA.

The record contains information concerning the range of salaries payable under different exempt and non-exempt salary grades. *See* Plaintiff's Exhibit 72. The CBA contains the salary designations for bargaining unit jobs. *See* Lightfoot Aff., Exhibit C. In 1998, grade E5 ranged from $42,396 to $67,837. Grade E3 was approximately $34,020 to $54,432. According to David Ratcliffe, President of Defendant GPC, the management level is considered to begin at E7. One of the Named Plaintiffs who currently works for Defendants is in exempt grade 5; one is at exempt grade 2; the other is a non-exempt employee. Prior to her resignation, Plaintiff P. Harris was in grade E5 as a market research analyst.

Plaintiffs complain of the breadth of the salary ranges in the various job or salary grades. They state that it is possible for an employee to be in a higher grade than another, yet earn less money. Plaintiffs assert that this is a means of masking discrimination against African-Americans. It is correct that the salary ranges overlap.

While all of the Defendants use the same salary grade system, within different subsidiaries a particular job may

[8] The record variously refers to these grades as salary grades, pay grades or job grades. The terms mean the same thing.

"top out" at a different salary grade from another on account of the attributes of that position within that particular subsidiary. Also, not all positions exist within every subsidiary.

Defendants utilize common compensation and promotions policies promulgated and administered by Defendant SCS, as follows.

JobNet Postings

The majority of Defendants' vacancies for non-covered positions are filled by posting the position on Defendant TSC's computer intranet system known as "JobNet," which is accessible to virtually all employees. Required qualifications for the job and the job duties are stated in the posting. The applications are screened by managers and sometimes by Human Resources ("HR") personnel and an interview list is derived. Part of HR's job is to seek diversity in the list. SCS recommends that all candidates who receive an invitation to interview for a position be asked the same questions and provides "structured interview" guidelines which are tailored to the skills needed for the job under consideration. Specific questions are provided which should be asked of all interviewees. SCS recommends that a selection committee evaluate the candidates and determine by consensus which is best for the position. Scoring sheets are provided for the committee members' use. (Wolfe Aff., PP 5-30).

The Defendants have submitted numerous affidavits from their managers which state that they use selection committees. However, they are not required to do so. Even in cases where a selection committee is used, the manager is not required to accept the committee's recommendation.

Leadership Development/Developmental Moves

Defendant companies utilize leadership development programs which are designed to identify employees who have demonstrated leadership potential and to provide them with opportunities to obtain experience in other areas. (Harber Aff., P 45).[9] They also maintain a professional mentoring program and a professional development program. All of these programs are partly intended to increase diversity at the management level.

Defendants seek to identify talent and sometimes make promotions or transfers as a "developmental opportunity." These developmental opportunities are not posted on Defendants' JobNet system. Plaintiffs complain that "developmental moves" tend to be offered to Caucasians in preference to blacks.

Performance Evaluations

SCS recommends that employees receive written evaluations, using a prepared form. A sample of the form is attached to Plaintiffs' Complaint as Exhibit D.

Progressive Promotions

Advances within a 'job family' for example, from engineer III to engineer II, are not posted as they do not reflect a job vacancy. Instead, an employee may receive a progressive promotion when she accomplishes certain predetermined goals or milestones associated with a position, or has demonstrated satisfactory performance over a

[9] Kathy Harber is the leadership development consultant at Defendant SCS.

sustained period of time. (Conoly Aff., P 13).[10] Plaintiffs assert that progressive promotions are discriminatorily denied to African-Americans because their performance and achievements are not fairly evaluated.

Job Re-evaluations

Managers have the discretion to re-evaluate jobs within their departments if they determine that the actual skills required are above or below those anticipated by the job criteria.

Job Rotation

There are occasions when two employees rotate jobs on a temporary basis so that each employee can learn new skills and gain a broader range of experiences. (Eavenson Aff., P 10; Hinson Aff., P 20).[11] Plaintiffs contend that African-Americans do not receive the same opportunities as whites for job rotation.

Merit Increases and Incentive Bonuses

Senior management within each organization provides guidelines to managers concerning merit increases. Managers and supervisors within individual departments have discretion to determine how to allocate individual merit increases.

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[10] Warren Conoly is the general manager of distribution services for Defendant GPC.

[11] James Eavenson is the Manager of Fleet Operations for Defendant GPC. W.R. Hinson is the assistant comptroller for Defendant GPC.

Most non-covered employees at Defendants GPC, SCS, and SCES are also eligible for lump sum incentive bonuses under a performance pay plan ("PPP").[12] Some managers allocate the same percentage to all employees regardless of performance while others allocate varying percentages in accordance with the achievement of individual or team goals. (Harvey Aff., P 19).

Plaintiffs complain that in practice managers discriminate against African-Americans in giving merit increases and incentive bonuses.

Affirmative Action/EEO

The Defendants have affirmative action plans, a Diversity Advisory Team, yearly goals for increasing diversity (the 2000 goal was to increase representation of women and minorities at Exempt Job grade 7), and other stated means of seeking diversity in the workforce including external recruitment. *See* Womack Aff., Plaintiffs' Exhibit 27. Plaintiffs assert that these procedures are ineffective.

Vacancies under the CBA

All transfers and promotions among covered positions are governed by the terms of the CBA. (Eavenson Aff., P 12). Managers have little discretion in the method or criteria used to fill these jobs. (Lightfoot Aff., PP 7-8). Instead, managers identify their needs and call the Labor

[12] Covered employees at GPC and employees working under a commission sales plan or an alternative compensation plan are not eligible for a PPP bonus. (Wilkinson Aff., P 11).

Relations Department at which point the jobs are posted and filled with the most senior bidder. (Hartz Aff., P 11).[13] The CBA provides that certain "lead" jobs will be awarded based on seniority, competency being equal. GPC does use written tests in gauging competency for this purpose. The CBA does not appear to cover the position of foreman. *See* Lightfoot Aff., Exhibit C.

III. THE NAMED PLAINTIFFS

Plaintiff Cornelius Cooper, one of seven Named Plaintiffs, is an African-American male employed by GPC as a lineman in Atlanta, Georgia. After high school graduation in 1970 Cooper worked in the concrete finishing business with his father. (Cooper Depo., p. 13). He has been employed by GPC since 1973 when he began working as a helper. Since that time, Cooper has worked as a winch truck operator, apprentice lineman, lineman, and lead lineman, all within the Customer Operations Division in or near metro Atlanta. (Cooper Depo., pp. 18-37, 47-50). He joined Local No. 84 of the International Brotherhood of Electrical Workers. The terms and conditions for all of these positions are covered by GPC's CBA.

Cooper has never taken the first line supervisor test, which has been identified by the Plaintiffs as a test which unfairly blocks African-Americans in covered positions from advancing to foreman. He has not applied for a foreman position since 1989 or 1990, as there have been no foreman positions open in his part of GPC since then.

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[13] Todd Hartz is the general manager of transmission maintenance for Defendant GPC.

Cooper Depo., p. 299. He has never applied for a crew leader position. *Id.* at 299.

Plaintiff Cooper alleges that he applied but was not selected for a non-covered (*i.e.*, non-union) position as trainer within the two year period[14] before this suit was filed. (Complaint, P 78). One of the positions was awarded to Charlie Johnson, an African-American. (Cooper Depo., p. 266). Several positions as trainer were open at that time. Cooper did not file a charge with the Equal Employment Opportunity Commission ("EEOC"). (Cooper Depo., p. 213).

Plaintiff Cooper also states that he previously had applied for numerous other non-covered postings. He was interviewed but not selected. *Id.* at 294. Cooper was unable to identify any instances of alleged harassment or any racially offensive comments, documents, objects, or other items within the two years preceding the filing of this suit. (Cooper Depo., pp. 213-220).[15]

Plaintiff Michael Edwards is an African-American male who has been employed as a lineman by Defendant GPC in Atlanta, Georgia. Following high school graduation in 1978, he enlisted in the United States Marine Corps. *Id.* at 10. During his tenure in the Marines, Edwards became certified as an aircraft mechanic.

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[14] Two years is the period of limitation for a Section 1981 claim. *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533, 1546 (11th Cir. 1988), *modified on other grounds*, 848 F.2d 1522 (11th Cir. 1988).

[15] In his deposition, Plaintiff Cooper described two racist comments which occurred more than two years prior to the filing of this lawsuit.

Edwards was hired by GPC in 1987. He has held various positions including utilityman and helper positions at Plant Vogle near Augusta, Georgia, an unassigned apprentice lineman position in Augusta and Hinesville, Georgia, and a lineman position (Customer Operations) in Tucker, Georgia. (Complaint, P 86). Each of these positions is covered by the CBA. He has had several extended absences as well as light duty assignments as a result of various injuries and medical conditions. (Edwards Depo., pp. 16-18). Plaintiff Edwards states that he left work due to injury on May 18, 1998 and returned on November 22, 1998. He then held a temporary position until that position was eliminated in April, 2000. *Id.* Edwards has been out of work on disability leave since that time. *Id.* at 18.

Plaintiff Edwards generally asserts that he has been denied promotions on the basis of his race. He applied and was interviewed for a cable locator position in March, 2000 which would have involved a cut in pay from lineman's pay[16] but which would have accommodated his physical limitations. The cable locator position was awarded to a Caucasian applicant. (Edwards Depo., pp. 93-94; Complaint, PP 88-89).

Edwards filed a complaint with the EEOC in 1999 alleging violation of the Americans with Disabilities Act. This claim did not mention race discrimination. Edwards has not identified any instances of harassment within the two years preceding the lawsuit. He states he did see a toy skeleton hanging from a cork board in the men's locker room at one facility before that. *Id.* at pp. 127-29. At about the time this lawsuit was filed, he filed a charge of discrimination with

[16] It is not clear that this position would have been a promotion.

the EEOC alleging individual and class-wide claims of race discrimination against Defendants and received a Notice of Right to Sue. (Complaint, P 93).

Plaintiff Charcella Green is an African-American female who is currently employed by Defendant GPC as an education services coordinator in Atlanta, Georgia. Green graduated from high school in Atlanta, Georgia in 1967 (Green Depo., p. 60) and received a B.S. degree in human services administration from Mercer University in 1981. In 1983 she received a master's degree in social work from Clark Atlanta University. In 1999 she received a Ph.D. degree. *Id.* at 69.

Green began working for GPC in 1983 in a temporary internship position in External Affairs. Subsequently she held positions as associate public information representative, assistant to the director of corporate communications, education services coordinator, communications coordinator, and area development organizer advisor. These are exempt positions. Her current position is at salary grade 5. Plaintiff Green alleges that she was denied an educational services manager position awarded to a Caucasian applicant on July 11, 1998.[17] (Complaint, P 110). Green believes the current holder of this position is at salary grade 7. (Green depo., p. 206). Green alleges that she has been compensated less favorably than several similarly situated Caucasian co-workers, and that several Caucasians with less education and seniority have received job rotations or other developmental moves that she has not received. (Complaint, PP 113-16). Green has not identified any

[17] This date is more than two years before the filing of the instant action.

workplace comments or conduct which could be characterized as racially hostile. She did not file a complaint with the EEOC.

Plaintiff Patricia Harris ("P. Harris") is an African-American female and a former employee of both Defendant GPC and Defendant Southern Company Services ("SCS") where she worked as a marketing research analyst. Harris received an associate degree from Gordon College in 1981. In 1985, she received a biology degree from Georgia State University in Atlanta, Georgia. Subsequently, in 1997, she earned an MBA degree from Georgia State University. (Complaint, P 154).

Plaintiff P. Harris began working for Defendant GPC as a secretary in 1990 in Marketing and Regulatory Affairs. After working for Defendant GPC for thirteen months, she was offered a permanent position and promoted to senior secretary by her supervisor, Buddy Cromer. (P. Harris Depo., p. 36). Subsequently, Harris advanced through several positions including research analyst and economic development analyst. These are exempt positions. (P. Harris Depo., pp. 34-39).

In 1997, P. Harris became an employee of SCS in a market research analyst position, an E5 grade position. (Complaint, P 159). The Complaint states that "[although the salary range for an E5 employee in 1998 was $42,396 to $67,836, [Plaintiff P. Harris' salary was only approximately $45,000." (Complaint, P 155). She generally alleges that she experienced racial discrimination in promotions, compensation and performance evaluations.

Plaintiff P. Harris applied for no promotions during the relevant two year period except for a liaison position which she could not identify. (P. Harris Depo., pp. 147,

259-60). She did not file a charge of discrimination with the EEOC. She could not identify any patently offensive racial comments, conduct, documents, objects, or events during the two year period preceding this lawsuit. *Id.* at 173-78. Plaintiff P. Harris voluntarily resigned in August, 1999. *Id.* at 16.[18]

Plaintiff Sarah Jean Harris ("S.J. Harris") is an African-American female who was employed by Defendant GPC from 1979 until mid-2000. Following graduation from high school in 1963, she took courses in shorthand, accounting, data processing and real estate law at Gwinnett Area Technical College and received certificates for completing numerous courses. She began working as a utility operator for Georgia Slack Company in approximately 1966. *Id.* In 1973, she began working as a secretary for Sears department store in Atlanta, Georgia. She also worked as a sales associate at Belk department store and as a bank teller at Gwinnett Federal Bank.

S.J. Harris began as a general "Clerk B" in a Region Operations facility in Lawrenceville, Georgia, moved to a secretary position in another facility as part of a reorganization in 1994, and became a region support representative in 1997. (S.J. Harris Depo., pp. 31-37, 62). These positions were not covered by the CBA and appear to be non-exempt positions.

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[18] Plaintiff P. Harris submitted a resignation memo to her supervisors which stated, "my experience at Southern has enriched me deeply . . . I am grateful for the positive experiences and relationships developed over the years at Southern." In another memo, written to her coworkers, Plaintiff P. Harris stated, "I look back and I am in awe of how God has placed the most wonderful people in front of me and placed them within one company – the Southern Company. I am definitely 'the better for it' for having experienced the Southern style.

S.J. Harris did not apply for any promotions during the relevant period. She could not identify any instances of a hostile environment during the relevant period. *Id.* at 157.

Plaintiff S.J. Harris received several poor evaluations and was placed in "positive discipline" in 1999. (S.J. Harris Depo., pp. 78-94, 101-02). Ultimately, she received higher levels of discipline, including probation. *Id.* at 106. Her employment was eventually terminated as a result of an incident during her probationary period. *Id.* at 158-60. Plaintiff S.J. Harris contends that her performance evaluations were tainted by intentional discrimination and that her termination was in retaliation for her participation in the instant litigation. *Id.* at 69-70. She filed a charge with the EEOC shortly after being terminated in the summer of 2000.

Plaintiff Irene McCullers is an African-American female hired by Defendant GPC as a file clerk in 1978. (McCullers Depo., p. 39). Before that she attended Blatton Business College, a two year business college in Atlanta, Georgia, and also worked in the claims department at Cotton States Insurance Company for approximately six years. *Id.* at 37.

In addition, McCullers has held at least ten other positions, in five separate job grades, including micrographics clerk, accounting clerk, accounting representative, document processing operator in finance at GPC, and processing operator I with the SCS Information Management Services Department. These are non-covered, non-exempt positions. She alleges she has experienced racial discrimination in promotions, compensation and performance evaluations. Specifically, Plaintiff McCullers alleges that she has received consistently low performance

evaluations and that she has received lower annual increases than her Caucasian co-workers. *Id.* at 133-35. In her deposition, Plaintiff McCullers failed to identify any examples of a hostile work environment within the relevant two year period. *Id.* at 146-52. Although she has never applied for a posted position, she alleges that she has been denied a number of progressive promotions. (McCullers Depo., p. 55; Complaint PP 151-52). In her deposition, Plaintiff McCullers stated that she never heard any racial epithet by any co-worker, supervisor, or manager during her employment. *Id.* at 63. McCullers did not file an EEO charge.

Plaintiff Carolyn Wilson is an African-American female employed by Defendant Southern Company Energy Solutions ("SCES") as a Project Analyst III in Forest Park, Georgia. Wilson attended college at Mercer University in Atlanta, Georgia.(Wilson Depo., p. 35) and also studied electronics as a Lance Corporal in the United States Marine Corps. *Id.* at 37.

Plaintiff Wilson initially worked for Defendant GPC in Customer Service beginning in 1985. (Wilson Depo., p. 11). She received several promotions before she applied for and received a project analyst position at SCES in 1997. She also applied and interviewed for a customer service representative position in 1998 and, after receiving an offer, declined it. *Id.* at 160-61. Wilson's current position, project analyst III, is an exempt position at salary grade 2. Wilson generally alleges that she has experienced racial discrimination in promotions, compensation and performance evaluations. She also claims that she was promised a $10,000 raise, but that she received only half of that amount. (Complaint, PP 132, 137). Also, she alleges that she was denied training opportunities by another African-American

employee in Human Resources, and that she has not received performance evaluations. *Id.* at P 141; Wilson Depo., pp. 38-41). Plaintiff Wilson has not identified any patently offensive racial comments, conduct, documents, objects, or events in the workplace during the two-year period. (Wilson Depo., pp. 88-97).[19] Wilson filed a charge with the EEOC at the approximate time this lawsuit was filed. The EEO complaint stated that she had been subjected to discrimination, but was unspecific as to the event or events comprising the discrimination.

Summarizing, the seven named Plaintiffs include three persons who no longer work[20] for any Defendant. Of the remaining four who are currently employed, one is a lead lineman whose rate of compensation is covered by a collective bargaining agreement. Two hold non-management, exempt positions in Atlanta, Georgia. One holds a non-exempt position. One of these four Plaintiffs (Plaintiff Wilson) filed a complaint with the EEOC complaining of disparate compensation and only Plaintiffs Cooper and Wilson were denied a competitive promotion within the two year period immediately preceding the filing of this suit.

IV. STANDING

Before a district court may undertake analysis of whether the requirements of Rule 23 of the Federal Rules

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[19] Plaintiff Wilson did state that on one occasion a co-worker asked her "what's wrong with black women?". (Wilson Depo., p. 90).

[20] The Court includes in this group Plaintiff Edwards, whose position was eliminated in April 2000 and who has been on disability leave since then.

of Civil Procedure are met so as to permit certification of this case as a class action, the court must first "determine that at least one named class representative has Article III standing to raise each class subclaim." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000). "Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others." *Prado-Steiman*, 221 F.3d at 1280 (*citing Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987)). "A named plaintiff in a class action who cannot establish the requisite case or controversy between himself and the defendants simply cannot seek relief for anyone – not for himself, and not for any other member of the class." *Griffin*, 823 F.2d at 1483. "Under elementary principles of standing, a plaintiff must allege and show that he personally suffered injury." *Id.* at 1482. Each claim asserted by a named plaintiff "must be analyzed separately, and a claim cannot be asserted on behalf on a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Prado-Steiman*, 221 F.3d at 1280 (*citing Griffin*, 823 F.2d at 1483).

After thoroughly examining the record,[21] the court has made the following determinations regarding Named Plaintiffs' standing to assert various claims:

Cornelius Cooper has standing, under § 1981 only, to assert a discrimination in promotion claim based upon his

[21] The court rejects the notion that Plaintiffs were not required to file an EEOC Charge within 180 days of any discriminatory incident. To the extent that Plaintiffs rely on undated activity, the court has not considered this in the issue of standing.

denial of promotion to a trainer position on August 26, 1998.

Michael Edwards has standing, under both Title VII and § 1981, to assert a discrimination in promotion claim based upon the denial of a cable locator position in April 2000.

Sarah Jean Harris has standing to assert discrimination in evaluation and compensation claims under Title VII and § 1981.

Carolyn Wilson has standing to assert a discrimination in compensation claim under Title VII and § 1981 and has standing to assert a discrimination in promotions claim under § 1981 only.

Charcella Green has standing to assert a discrimination in compensation claim under § 1981. She would have standing as a class member to assert a Title VII claim based on the EEO charges filed by Carolyn Wilson if this case were certified as a class action.

Irene McCullers has standing to assert a discrimination in compensation claim under § 1981 and has standing to assert a discrimination in progressive promotions claim under § 1981 based on Defendants' failure to promote her to Processing Operator Senior. She would also have standing to assert these claims under Title VII cased on Carolyn Wilson's EEO charge if this case were certified as a class action.

Patricia Harris has standing to assert discrimination in compensation and promotion claims under § 1981 only.

The Named Plaintiffs have no standing to assert other claims.

V. ALLEGATIONS OF CLASS WIDE DISCRIMINATION AS SET FORTH IN THE COMPLAINT

Section V of the Complaint sets out Plaintiffs' allegations of class-wide discrimination. Plaintiffs urge that there is a class wide "continuing pattern and practice of racial discrimination"; that they and the class have been subjected to discriminatory treatment; and that "the Defendants' policies and practices have had an ongoing disparate impact." (Complaint, PP 31, 32). The Complaint, Section V, sets out as the ways in which Defendants discriminated against African-Americans the following:

> d. Failing to promote African-Americans to the same level or at the same rates as similarly-situated Caucasians;
>
> e. Maintaining written and unwritten policies and practices regarding job opportunities, including the use of a highly subjective job posting and interview process, that significantly hamper the ability of African-Americans to advance and obtain open positions;
>
> f. Creating and maintaining a "glass ceiling" that virtually excludes African-American employees from obtaining senior-level positions;
>
> g. Paying non-covered African-American employees less than Caucasian employees who perform the same or similar work;
>
> h. Maintaining written and unwritten policies and practices for determining compensation that result in non-covered African-Americans receiving lower compensation than their Caucasian counterparts;
>
> i. Maintaining written and unwritten policies and practices for performing evaluations of employees

that provide managers with significant discretion and allow them to place inappropriate weight on subjective criteria, resulting in biased and inconsistent performance evaluations;

j. Failing to provide African-American equal terms and conditions of employment, including subjecting African-American employees to a racially hostile environment;

k. Failing to properly monitor and oversee employment, personnel and human resources practices and failing to provide adequate training and oversight of supervisors to ensure that Company policies are applied consistently and in a nondiscriminatory manner.

VI. EVIDENCE RELIED UPON BY PLAINTIFFS TO OBTAIN CLASS CERTIFICATION

Plaintiffs base their motion for class certification on a number of evidentiary sources: selected deposition excerpts, affidavits, a large number of documents (mostly documents generated by Defendants), the expert report of an economist, Dr. Janice Madden, analyzing promotions and salary data, and the expert report of Dr. Kevin Murphy, a psychologist.[22]

[22] Defendants have submitted a large number of affidavits mostly describing the companies' policies and procedures regarding promotions and compensation as well as the efforts which have been made to improve diversity. Defendants have also tendered an expert report of an economist, Dr. Joan G. Haworth, which evaluates Dr. Madden's expert report and offers additional statistical analyses which support Defendants' position that they do not discriminate. Defendants also offer the report of Ronald R. Sims, Ph.D., a professor of organizational behavior and human resources, which criticizes and responds on a point-by-point

(Continued on following page)

Overall, Plaintiffs' evidence breaks down into a number of substantive categories: statistical evidence and expert testimony regarding discrimination in promotions and compensation, "hostile environment" evidence concerning racial jokes and nooses found at GPC's facilities, evidence of individual African-American employees' experiences with efforts to obtain promotions and increased compensation and their belief that they have been discriminated against; evidence that Defendants' promotions and compensation policies include aspects of subjectivity or discretion which can mask discrimination; and evidence that past racial inequities known to Defendants' management have not been corrected. Each will be discussed and evaluated in turn, beginning on page 37, *infra*.

VII. LEGAL STANDARDS

Plaintiffs seek to have the class certified under Rule 23 of the Federal Rules of Civil Procedure, which provides in relevant part:

> (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2)there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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basis to the opinions expressed by Plaintiffs' expert witness Dr. Murphy.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The burden of establishing the specific prerequisites to a Rule 23 action falls on those seeking certification. *Hudson v. Delta Airlines, Inc.*, 90 F.3d 451, 456 (11th Cir. 1996); *Gilchrist v. Bolger*, 733 F.2d 1551, 1556 (11th Cir. 1984). The Court must be satisfied, after a "rigorous analysis," that the requirements of Rule 23(a) have been fulfilled. *Coon v. Georgia Pacific Corp.*, 829 F.2d 1563, 1566 (11th Cir. 1987).

1. Rule 23(a)

A. Numerosity

The SHIPS database information produced by Defendant TSC establishes that the proposed class encompasses over 2400 people, a number well in excess of the number needed to satisfy the numerosity requirement. *See Cox v. American Cast Iron Pipe Company, Corp.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("more than forty" adequate to satisfy numerosity requirement). Defendants do not contest this.

B. Commonality and Typicality under Rule 23(a)(2-3)

Plaintiffs contend that there are questions of law and fact common to the class and that the claims of the Plaintiffs are typical of the class members so as to warrant designating them as representatives of all of Defendants' African-American employees from July 1998 to the present, and in the future as well.

Defendants emphasize that "the countless individualized inquiries necessary to adjudicate the purported class-wide claims overwhelm any cohesiveness and render collective treatment completely inappropriate." (Defendants' Brief, p. 31).

The commonality requirement does not require that all questions of fact and law raised in the action be common. However, "the claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs." *Cox, supra,* 784 F.2d at 1557. An analysis of typicality is similar to commonality, but there is a stronger focus on the representative named plaintiffs. *See Prado-Steinman ex rel.*

Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) ("commonality refers to the group characteristics of the class as a whole and typicality refers to the individual characteristics of the named plaintiff in relation to the class").

There is an interrelationship between the Rule 23 requirements of commonality, typicality, and adequacy of representation:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 157 n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982)

Thus, sections 23(a)(2) and (a)(3) are calculated to ensure that regardless of whether the class representatives and all class members win and the opposing party loses, or alternatively if the class representatives and class members lose and the opposing party wins, all who are affected on both sides will have had a fair opportunity to have their claims or defenses heard and determined on the merits.

While it is relatively simple to evaluate the merits of a dispute involving one plaintiff and one defendant, fairness to both sides in a class action is a far greater challenge and places considerable responsibility on the Court. If a class representative with a weak case loses and individual class members with strong cases are bound by the negative outcome, an injustice will have occurred. Similarly, if a winning class representative's claim and the class member claims are dissimilar, it may be unjust for the opposing party (usually the Defendant) to be responsible for the claims of class members. The Court's responsibility is to make sure that the common bond between the class representatives' claims and those of the class is strong enough so that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives. That is the very purpose of Rule 23(a).

Plaintiffs argue that common factual and legal issues exist which would be significantly dispositive of the issue of liability as to all class members. They argue that their evidence is strong enough to establish a presumption or pattern and practice of discrimination common to all class members as well as themselves. Plaintiffs specifically argue that the evidence of Defendants' promotion and compensation practices (*e.g.*, use of subjective criteria for promotions, non-posting of some job openings) coupled with the expert testimony of Dr. Madden and that of Dr. Murphy proves that Defendants' personnel and compensation practices as a whole have adversely impacted all African-Americans in the class. They also argue that when the statistical evidence is coupled with evidence of numerous acts and statements of racial hostility within the Defendant companies, plus evidence that many African-American employees have not received deserved promotions, a "pattern

and practice" of racial discrimination is revealed which is common to all Named Plaintiffs and class members.

Defendants argue that the statistical, anecdotal and other evidence is insufficient in quantity and quality to raise a presumption of discrimination or to show a pattern and practice of discrimination common to all class members. Defendants argue that the statistical proof is seriously flawed in numerous respects.

Plaintiffs seek to proceed under two different substantive theories recognized by the law in discrimination cases: disparate treatment and disparate impact. A plaintiff generally establishes disparate treatment by showing that the employer intentionally treated him less favorably than similarly-situated white employees because of his race. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983). A three part inquiry established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), requires the plaintiff to prove his qualification for a denied promotion which went to a nonmember of a protected class; the defendant employer must state a nondiscriminatory reason why the plaintiff was not chosen. Plaintiff must then establish that the Defendant's stated reason is a pretext for discrimination. Obviously, this is a fact-intensive process which focuses on the facts surrounding a particular plaintiff's claims. To obtain certification of a class in so-called disparate treatment cases, the plaintiffs must show not merely that they individually were subjected to discriminatory ("disparate") treatment; they must show that "racial discrimination was the [company's] standard operating procedure – the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324,

336, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). This type of case is called a "pattern and practice" case. Plaintiffs contend that their statistical and other evidence meets this standard.

Under the so-called disparate impact theory, Plaintiffs must show that a facially neutral requirement or policy of Defendant's disproportionately and adversely affects members of a protected group. Where this showing is made, the employer then has the burden of demonstrating the necessity for and job-relatedness of the criterion in question. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). A classic disparate impact case would be presented, for example, where an employer has minimum height and weight requirements which disproportionately exclude women, *See Dothard v. Rawlinson*, 433 U.S. 321, 331-4, 53 L. Ed. 2d 786, 97 S. Ct. 2720 (1977) (disparate impact found for height and weight requirements for prison guards). Again, Plaintiffs contend the statistical evidence shows that African-American employees have been disproportionately disadvantaged by the collective whole of Defendants' personnel policies.

1. Typicality

The Court will first address the issue of typicality. Plaintiffs have made little effort to show what facts prove this requirement. While the complaint does detail the profiles of each of the Named Plaintiffs, Plaintiffs have not attempted to relate the profiles to those of the class or different segments of the class. Rather, Plaintiffs emphasize the fact that all claims share common legal theories

and that a "pattern and practice" of discrimination affects all class members.

The Court is unconvinced that Plaintiffs Edwards, S.J. Harris and P. Harris have claims typical of those of the class. Edwards' claims uniquely involve the factual issues surrounding his disability; P. Harris voluntarily resigned and has asserted no timely promotions claims of substance[23] and S.J. Harris was involuntarily terminated at approximately the time this litigation began for an alleged incident which occurred when she was already on disciplinary probation. While each of these Plaintiffs may ultimately have one or more meritorious claims, their claims involve idiosyncratic features, raising questions concerning their ability to represent absent class members. Plaintiffs have the burden of showing typicality, and have failed to make an adequate showing as to these Plaintiffs.

With respect to Named Plaintiffs Cooper, Green, McCullers and Wilson, the Court is unconvinced that they have claims typical of the class as a whole. No factual showing has been made in this regard.

Turning to the question whether individual Named Plaintiffs may have claims typical of some subgroup, Plaintiff Cooper's position (lineman) is covered by the CBA, a characteristic shared by a large number of potential class members. Plaintiffs' complaint specifically states that only 5 of 150 foremen (3.3%) at GPC are African-American, even though large numbers of African-Americans such as Cooper hold lineman jobs, the "feeder

[23] Harris claimed to have applied for some type of liaison position in April 1999, but could not identify the position.

pool" for this position. Plaintiffs' theory appears to be that GPC is using a written test, the first line supervisor test, to improperly hold African-Americans back from foreman. Plaintiffs seem to assert that seniority, not the ability to pass the test, should govern these promotions or alternatively that the test is not valid. However, Cooper has never taken the first line supervisor test, and has not applied for a foreman position in recent years. Cooper's claim, as expressed in the Complaint, is that he was wrongfully denied a trainer position at GPC's Klondike Training Center. This is a non-bargaining unit position for which there were competitive interviews. The Court finds that Cooper's claim for discriminatory denial of promotion from a position covered by the CBA to an exempt position is typical of those of other covered employees who seek similar promotions. However, Cooper's claim is not typical of those covered employees who seek the positions of crew leader or foreman.

Based on the information provided, the Court is not convinced that Plaintiffs Green and Wilson, who are exempt non-management employees, have claims typical of those absent class members who aspire to Defendants' top management as described in paragraphs 34, 35, 36 and 38 of Plaintiffs' Complaint. Wilson's position (Exempt level 2) is not close to management ranks. While Plaintiff Green did apply for a position at level 7, Defendants' management levels go from 7 to 15. Also, Green did not apply for a competitive promotion within the two year period of limitations for § 1981 claims. Green has standing to assert a compensation claim under Title VII and § 1981, but no standing to assert a promotion claim. Thus, none of the Named Plaintiffs have promotions or compensation claims

which are typical of those of management level employees at Exempt Levels 7-15.

The Court finds that Plaintiff Wilson has promotions and compensation claims typical of those of exempt non-management employees. Also, Plaintiff McCullers has compensation and progressive promotions claims typical of those of non-exempt, non-covered employees. Plaintiff Green has compensation claims typical of those of exempt non-management employees.

2. Commonality

With respect to commonality, again it seems to the Court that it is impossible to conclude that the employment experiences of the Named Plaintiffs or the specific ways in which they claim to have experienced discrimination may be fairly compared with the history or individual experiences of absent class members or that the claims of class members share discrete common features such that rulings could be fashioned to fairly adjudicate these claims as a group. It is obvious that the Defendant companies collectively have a large number of employees, with many different job classifications, different locations, different supervisors, differing modes and levels of compensation, and many skill levels. It is unlikely that proof of a particular Named Plaintiff's claim would shed light on the merits of an absent class member's claim.

Thus, it appears that whatever commonality may exist could only be a function of the alleged pattern and practice of discrimination or disparate impact of unjustified policies which affect the members of the class. Plaintiffs contend that the pattern and practice is shown by the statistical evidence, the alleged atmosphere of racial

hostility as shown by the evidence about the nooses, racial jokes, slurs and epithets and the affidavits of 111 potential class members who have related their own experiences. Plaintiffs assert that the conclusions of Dr. Madden prove that Defendants' collective policies have adversely impacted African-American employees of Defendants as to promotions and compensation. Therefore, it is important to focus on the relative strength and quality of that evidence to determine if it is strong enough to provide the element of commonality needed for class certification. The Court will first describe and evaluate the reports of Plaintiffs' experts.

a. Murphy Report

Dr. Murphy summarizes his general conclusions drawn from his examination of Plaintiffs' affidavit and deposition testimony as well as other data concerning Defendants which was provided to him by Plaintiffs. The report concludes that Defendants have adopted "policies aimed at preventing or minimizing the likelihood of discrimination," but that managers and supervisors have "discretion to ignore these policies and use criteria that are not job related." (Murphy Report, p. 2). The report also makes general conclusions such as "there is little indication that [managers or supervisors] have the information, training, support or oversight that would allow and require them to make employment decisions on the basis of criteria that is job related." *Id.* at 8. This conclusion was based on the fact that Dr. Murphy was unable to find among the documents which he reviewed an "indication of any mandatory program to train managers or even to assist them in making decisions about job-posting, hiring, promotion, and compensation in a way that will be job-related and

that will avoid discrimination against black employees." *Id.* Essentially, Dr. Murphy's report is a summary of Plaintiffs' evidence which is used in support of their motion for class certification, together with his own opinion of what impact these Defendant policies, or lack of policies, might have had on African-Americans. As such, it has no usefulness as an expert report.[24]

b. Madden Report

Dr. Janice Madden obtained raw data concerning each of Defendants' employees from Defendants' SHIPS system, a computerized personnel database used by all of the Defendants. After organizing and evaluating the data provided, Dr. Madden reached conclusions which Plaintiffs argue support their claim that Defendants' collective decisionmaking processes which determine promotions and compensation have disproportionately and adversely affected African-American employees. Defendants on the other hand claim that Madden's analyses and computations are invalid or of limited value for a variety of reasons.

Madden's written reports dated March 27 and June 12, 2001, entitled "Evaluating Whether Employment Practices at Southern Company Are Racially Neutral"

[24] For the same reason, Dr. Sims' rejoinder to Dr. Murphy's report is of little assistance in determining the facts or in determining whether Defendants support a pattern and practice of discrimination or have invalid policies which have a disparate impact on African-American employees. Also, neither Dr. Murphy nor Dr. Sims is an expert on Defendants' businesses. They both make wide-ranging assertions and conclusions based entirely on a set of documents provided for their review. Both point out what "could happen" under Defendants' policies.

(hereinafter "report") have been reviewed by the Court. The report concludes that African-American employees within the Defendant companies received 14.3% fewer promotions than would be indicated by their numerical representation in the workforce from December 31, 1996 through December 11, 1999. It also concludes that for the years 1995-1999 combined the correlation between race (African-American) and odds of promotion, controlling for the factors of salary grade, subsidiary, tenure with Defendants, time since completing schooling, level of education and initial job function[25] is a correlation of minus .3836 with a Z value of 6.87.[26]

Using the same control factors, Madden determined that the estimated percentage differences in compensation between all white and black employees (excepting union employees) were as follows in each of the indicated years:

1995	3.28%
1996	2.83%
1997	2.95%
1998	2.76%
1999	2.11%

[25] Initial job function is defined as job function as of 1995, if hired before then, and at time of hiring if hired after 1995. Job function does not mean job title. Defendants' SHIPS database contains codes for twenty-two "job functions" such as Administration, Operation, Generation, Marketing, and Customer Services. Neither does job function refer to a particular department.

[26] A Z value of 6.87 means it is very unlikely that the correlation occurred by chance. The higher the Z value, the greater the unlikelihood.

The percentages were found highly unlikely to be the function of chance.[27]

In analyzing promotions, Madden first constructed "pools"[28] of employees for the purpose of determining whether African-Americans in each pool received a proportionate share of promotions based on the ratio of African-American employees to total employees in that particular pool.

The report states that 288 employee "pools" were constructed. Within each of the Defendant companies (not including Southern which has no employees) she constructed pools or lists of employees within each salary grade[29] for each calendar year from 1996 through 1999. She used year-end data in each calendar year. By comparing the identity of the employees in the pools from year to year, she was able to identify those employees who had received promotions during the past calendar year. In Madden's study the term "promotion" meant (1) receiving an increase in salary grade, (2) moving from a non-exempt to an exempt position, or (3) moving out of a union job into a nonunion job with a higher annual rate of pay. She was able to identify the promoted and the non-promoted employees by race. In this manner, she determined the

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[27] The relevant Z values ranged from 7.75 (1995) to 3.83 (1999).

[28] The report states this is a "multiple pools test."

[29] The salary grade system at all of the Defendant companies is the same although different jobs carry different ranges of salary grade. For example, a particular job opening might announce that the position is in Grades 3-5. The successful applicant could be offered compensation within Grades 3, 4 or 5. Plaintiffs believe this is one of the mechanisms used to discriminate against African-Americans.

percentage of promotions which had gone to African-American employees in individual pools in each year.

Madden then determined the numerical extent to which promotions of African-American employees either exceeded or fell below that projected by their proportionate representation within each pool for each year. She then added the positive and negative numbers yielded by the foregoing analysis of all of the individual pools, and determined that while African-American employees received a total of 531 promotions in 1996-1999, their numerical presence within the total employee population yielded an expected number of 607 promotions. Thus, Madden determined that promotions for African-American employees fell short by 76 during 1996-1999, a percentage shortfall of 14.3%. A further calculation determined a probability of less than 3 in 100,000 that this result is due to chance.[30]

As a second step in analyzing promotions, Dr. Madden performed another statistical analysis[31] to determine the degree of correlation between race and odds of promotion. To do this she analyzed the promotions given to African-Americans and Caucasians in Defendants' workforce combined, using the following controls: (1) the salary grade of each employee, (2) the employer (GPC, SCS or SCES), (3) the employee's experience and (4) the employee's education. "Experience" for this purpose was defined as the amount of time a particular employee had

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[30] Madden used the "multiple pools exact test", a generalization of Fisher's Exact Test, to make this determination. *See* March 27 Madden report, p. 5.

[31] A logistic regression test.

spent in the work force after finishing formal education, as well as the amount of time an employee had worked for one or more of the Defendant companies.[32]

As to education, Madden classified employees according to 13 educational levels: unknown, less than high school, GED, high school diploma, training certificate, more than high school, little college, associate degree, some college, bachelors degree, some graduate school, masters degree, and professional degree.

As previously stated, Madden found some negative correlation (minus .38) between race (African-American) and odds of promotion.

In order to measure the relationship between race and salary at the Defendant companies for each of the years 1995-1999, Madden did the following: She first determined that in each of these years African-American employees within each salary grade at each subsidiary company made less than other employees. Union employees were omitted from these calculations.[33] She also performed calculations utilizing additional variables (subsidiary interactions,[34] salary grade, job function, experience, and education) in different combinations.[35] As previously

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[32] Apparently these two components of "experience" were treated as two separate variables.

[33] It appears that Plaintiffs are not asserting discriminatory compensation within the covered, or union, workforce.

[34] It is unclear what is meant by "subsidiary interactions".

[35] This calculation is a multiple regression analysis. Multiple regression analysis is a quantitative method of estimating the effects of different variables on some variable of interest. In multiple regression, one first specifies the major variables that are believed to influence the dependent variable. There inevitably remain minor influences, each one

(Continued on following page)

stated, this calculation showed that the wage gap between white and black employees was between 3.28% and 2.11% depending on the year.

After reviewing Madden's report, Haworth's report which criticizes Madden's report, and the arguments of the parties, the Court concludes that while Madden's methodologies may be valid, the analysis has some limitations which undermine its usefulness in measuring whether Defendants' employment practices are racially neutral. Primarily, this is caused by the failure to adequately measure the promotion and compensation experiences of similarly situated employees. Most importantly, Madden identified "experience" as one factor which has a bearing on promotions and compensation level, obviously a critical variable. However, under Madden's definition "experience" meant only (1) the amount of time which had elapsed since the individual's finishing formal education and (2) the amount of time the individual had been on Defendants' payroll. There was no consideration of such factors as type or level of acquired skills, both of which are highly related to promotions and level of compensation. Neither was there any effort to compare employees with equivalent work experience in specific job categories or job progressions. Admittedly, it would be very difficult to factor those

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perhaps very small, but creating in combination a non-negligible effect. These minor influences are treated by placing them in what is called a random disturbance term and assuming that their joint effect is not systematically related to the effects of the major variables being investigated – in other words by treating their effects as due to chance. The relationship between the dependent variable and the independent variable of interest is then estimated by extracting the effects of the other major variables. Fisher, Multiple Regression in Legal Proceedings, 80 Colum.L.Rev. 702, 705-06 (1980) (footnotes omitted).

considerations into a statistical analysis such as the one Madden performed; however, their omission is relevant in determining how much confidence to place in her conclusions.

Also, Madden did not compare outcomes for those employees, both black and white, who had actually applied for posted positions. Because Defendants maintain an automated application process for all competitive promotions for nonexempt and exempt positions, this comparison is not difficult.

In determining whether or not a given employee had had a promotion, Madden did not distinguish between so-called progressive promotions (which do not involve a job vacancy but rather moving the employee to a higher salary and title within a job family) and competitive promotions. Some progressive promotions occur within a given salary grade; these in-grade progressive promotions apparently were omitted entirely from Madden's study. This appears to be a flaw. Defendants also argue that it is improper to lump progressive promotions and competitive promotions together; however, this argument is rejected because both types of promotions involve evaluative choices by management.

Defendants object to Madden's definition of "education" because it fails to take into account field of study. Defendants point out that at their higher salary grade levels, large percentages of managers possess engineering degrees, whereas within the African-American population at large as well as within the Defendant companies, African-Americans do not tend to hold engineering degrees as compared with degrees in other fields of study. The Court believes that the Defendants have a valid point,

insofar as Madden's conclusions are directed toward the higher levels of management; however, as to employees at level 6 and below, Madden's definition of education is fully adequate for the purpose chosen.

Dr. Haworth's report is particularly critical of Dr. Madden's analysis of promotions for failing to model the analysis to the decisionmaking process actually used by Defendants. Haworth points out that there are typical lines of promotion within departments and job families which were not considered by Madden. Haworth's point has merit;[36] Madden did not compare similarly situated individuals.

In seeking to show that Defendants' promotions and compensation policies are racially neutral, Defendants rely on Dr. Haworth's report which concludes there is no reliable evidence that there is any difference in treatment as between whites and blacks. Haworth analyzed the issue of effect of race on salary and promotion by using more variables and by comparing the experiences of more similarly situated individuals. Haworth's analysis revealed that there were small gaps between the promotions rate for African-Americans versus Caucasians, as well as small salary gaps; however, she determined that these gaps were not statistically meaningful. Madden in turn replied, in her June 12 report, that the lack of statistical significance was due to the fact that Haworth had "carved up" the employees into pools[37] so small that it would be

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[36] In Madden's June 12 report she added job function as a control; however, she used only 22 job functions for all employees. She did not consider normal lines of progression; apparently, Madden did not have data needed for this purpose.

[37] Dr. Haworth also used the multiple pools analysis.

unlikely that the results would be statistically significant. The Court believes there is some truth in this. The Court also notes that Haworth's analysis did not include the so-called "developmental moves" in her analysis of promotions. Neither has either side offered evidence concerning what percentages of promotions occur through developmental moves. This is a factor limiting the usefulness of Haworth's report to the extent it is intended to prove that Defendants' treatment of African-Americans is the same. After reviewing both reports, as well as other information in the record, the Court is left with the impression that there could be some salary gap and promotions gap between African-American and white employees working for the Defendants, although it is impossible to determine what the gaps are, whether they are statistically significant, or whether factors other than race are involved.

Defendants have pointed out that of the 148 "pools" of employees identified by Madden for the years 1998-1999, only three pools showed a representational deficiency of African-American promotions: two union salary grade pools and one pool for non-exempt salary grade 5 employees. While this may not undercut the validity of the method Dr. Madden used, it may be evidence that promotional inequity affecting African-American employees (defining inequity as lack of at least proportionate representation in the promoted pool) exists only in segments of the workforce.

Based on the foregoing analysis of the expert testimony offered by the parties, the court concludes there has been an inadequate showing by Plaintiffs to raise a presumption of discrimination arising from application of the collective whole of Defendants' compensation and promotion policies. Thus, disparate impact analysis produces no

evidence common to the claims of all class members. Also, the expert testimony fails to establish evidence of a pattern and practice of discrimination.

c. Noose Evidence

In further support of their argument on the issue of commonality, Plaintiffs cite the existence of various nooses at various GPC locations which establish the existence of an atmosphere of hostility common to the class as a whole. The evidence on this point is as follows.

This case was filed on July 27, 2000. The original complaint contained the following allegation:

> from 1997 through 1999 Defendants permitted a hangman's noose to be hung in a heavily traveled area of Georgia Power's operating headquarters at Cornelia [GA]. Although a hangman's noose has long been one of the most chilling representations of racial harassment, two Georgia Power Vice-Presidents and several managers who were aware of and had even viewed the nooses took no action to remove it. Rather, they allowed it to hang for nearly two years.

Within a few days after the lawsuit was filed GPC undertook an investigation into the Complaint's allegations. This included site investigation of numerous company premises in various locations regarding conduct which might be intimidating or offensive to African-American employees. The investigation did reveal a number of arguable "nooses" hanging or lying in various locations where rope is available for use by GPC's employees. The investigators took statements from employees at those locations to determine what explanation existed and

whether the surrounding circumstances suggested an intent to intimidate African-American employees. Photographs were taken and the nooses were removed.

Defendants' investigative memoranda, which are voluminous, are in the record as Plaintiffs' Exhibit 5 to the motion for class certification and have been reviewed by the Court. A photograph of the alleged noose referred to in the Complaint is attached as Exhibit A to the Complaint; other alleged nooses appear in photographs marked as Exhibit 5 of the Appendix filed in support of Plaintiffs' motion for class certification.

Regarding the nooses, the Court notes that GPC's covered employees use rope constantly in their work. In fact, knot tying is a skill taught at GPC's Klondike Training Center. Rope is supplied at GPC's plants and operating centers. Therefore, the fact that rope or knotted rope is found hanging or lying in a GPC facility is itself a fact of no consequence. The important focus is whether, contextually, knotted rope was used or displayed in a manner intended to demean or intimidate African-Americans.

After reviewing Plaintiffs' exhibits, particularly Exhibit 5 and the affidavits of those absent class members who had observed a "noose" on GPC premises, it does appear that at numerous times at various locations knotted rope was present which resembled a noose. These "nooses" did offend and intimidate some employees, who attributed a racial significance to the nooses. The sworn statements of Defendants' employees, on the other hand, disavowed any knowledge of racial meaning or racial animus.

The evidence shows generally that various alleged "nooses" were found in GPC's investigation which had

been in existence, uncommented-upon by either white or black employees, for long periods of time. In the affidavits of prospective class members presented by Plaintiffs, some affiants commented that they had seen nooses which reminded them of lynchings of blacks in the old South. However, very few of them said that they had pointed this out to management, or for that matter even to other employees. In only two instances did they say that anyone had made any verbal remarks relating the noose to a lynching.

The two incidents in which a Georgia Power supervisor made such a comment about a noose are described as follows. The first reference is in a statement of an employee.

> While working at Georgia Power, I have been subjected to unequal terms and conditions of employment, including being subjected to a racially hostile work environment. For example, while I was working in Dalton, some white employees and I were taking a break and showing each other knots. One white employee, John Armstrong, showed us how to tie a hangman's noose. After telling us the number of loops the knot had to have in order to be legal for executions, he pointed to me and said, "Pete, you probably wouldn't need six loops." I found this comment highly offensive and degrading. He did not make any such remark to any of the white employees. The noose was then hung in the storeroom, and every time through 1988 that my position brought me back to Dalton, I saw it hanging there. None of the other knots was hung in the storeroom.

(Affidavit of Lavern E. Anderson, P 11).

GPC found a noose at its Dalton facility on August 4, 2000 which was hanging "from a metal bar on a rack in the common area of the storeroom." (Plaintiffs Exh. 5, p. 2269).[38] This appears to be the same noose identified in the affidavit of Lavern Anderson. Ralph Magnifier, a white crew leader at the Dalton facility, believed that the noose had been present for ten years. "He did not see the noose as being offensive and had not seen any other symbols that may be considered offensive." *Id.* at 2270.

The other incident occurred at Plant McDonough in 1994 and was recounted by GPC's white male supervisor as follows:

> I went into the control room [at Plant McDonough] to visit the two operators on duty and while in the area found a short length of rope (about six feet). While chatting with the men in the control room, I tied the rope into a hangman's noose, something I learned to do as a kid, being infatuated with Westerns on T.V.
>
> Royce Brown walked into the control room and in my casual nature with my employees, there were comments made in jest about the rope. Mr. Brown left the area and I untied the rope and left it in the area when I departed.
>
> Someone (unknown) contacted me to let me know that [Mr. Brown] was upset about events that occurred in the control room. I recognized that I had made a mistake with one of my employees and made plans to find [Mr. Brown]. I located him on the plant site, within an hour, and made

[38] This page number refers to the sequential confidentiality number located on each successive page of Plaintiffs' exhibits.

> a sincere apology for anything that I might have done in the control room to offend him.

(Plaintiffs' Exh. 5, p. 2104).

Other findings in GPC's investigation were as follows:

Two nooses were found at Defendant GPC's Cornelia facility, one in a storeroom and one in the office of Ken Kirby. In his statement, Kirby stated that he "hung the skeleton/noose on a door several years ago with a no smoking sign attached to it. It was at a time before smoking was prohibited in [GPC] buildings." (Plaintiffs' Exh. 5, p. 2136). With respect to the noose found in the storeroom, George Chapman stated that "he thinks someone dabbling with rope probably made it one rainy day. He doesn't know who made it or hung it up. He doesn't know of any problems at [Cornelia] of an employee, racial, or discriminatory nature." *Id.* at 2134. Christina Hodges, an African-American customer service representative working at Cornelia, stated that she "never saw a noose until she saw the picture in the paper. She knows of no problems at [Cornelia]." *Id.* at 2135.

Another "noose" was found by GPC at its Athens facility and was removed by management. (Plaintiffs' Exh. 5, p. 2121). During the investigation, GPC investigator Norman Holle stated that if the noose had not been pointed out to him, "he probably would have never seen it." The noose was located at the top of an 18' garage door used by large trucks. Three statements were given with respect to this matter. The first statement merely acknowledged the presence of the noose. (Statement of [unidentifiable] Holle; Plaintiffs' Exh. 5, p. 2127). The second statement, provided by Luther Standridge (race not noted) states:

> I came to work for Georgia Power in February 1985. I was trained to dielectric test trucks shortly afterwards. The noose was hanging within clear view of where we sat to run the test machine. It was there before I came to work for Georgia Power. I never considered it to be anything racial. I tested trucks with men both black and white and I never heard a comment made about it. I would associate a noose with the old west rather than something racial.

(Plaintiffs' Exh. 5, p. 2128).

The third statement with respect to the Athens noose, provided by Al McKeever (African-American), states:

> I, Al McKeever, am a mechanic at the Athens Fleet Services Garage. I have been in the garage for approximately 30 years. I don't know who put the noose on the rail nor do I know exactly when it was put up. It has been there for approximately fifteen years or longer. The noose never bothered me. Since the lawsuit in 72-73 about discrimination, I have not been threatened, harassed, or intimidated in any way.

(Plaintiffs' Exh. 5, p. 2129).

On August 18, 2000, Dwight E. Stevens conducted an investigation at GPC's Milledgeville Operating Headquarters and found a training rescue mannequin laying in a storeroom which had a 3/8" polyester rope tied around its neck. (Plaintiffs' Exh. 5, p. 2239). The mannequin is not identifiable as being of a particular race. Paul Morgan, an African-American truck operator working at the Milledgeville facility, stated in his investigative interview that "he had not seen the noose and therefore, was not offended by it. He only saw the end of the rope hanging from the

dummy and did not know what the rope terminated into." *Id.* at 2242. Another employee at the Milledgeville facility, J.D. Parker, an African-American employee, provided the following statement regarding the noose:

> I have seen the dummy hanging up at the shed with a noose around its neck. I think it was done as a joke because of how heavy it is. It was not done because of race. I have heard that Paul and Jim [unidentified] did it, but I did not see them do it. If you ask me if they did it I would have to say that I think they did but do not know for sure that they did. That thing sure is heavy and needs to go on a diet.

(Plaintiffs' Exh. 5, p. 2261).

GPC also found two possible nooses at its Forest Park location in its investigation. In the first instance, Dan Fleming, a white male, reported a rope tied to a fan in his work area. "Fleming states that this rope had been tied to this fan for, at least, the past six years, during which period he has worked in this area. Fleming told his supervisor, Mark Sanders, about the rope, as a direct result of the heightened issues affecting diversity, and, subsequently Sanders removed the rope." (Plaintiffs' Exh. 5, p. 2175).

The other possible noose was found on the tool box of Preston Owings. Owings stated that "the rope in question, was not noose, but a small piece of nylon rope, knotted twice with a half hitch knot, and used to life [sic] the end bell of a motor housing, as work conditions required." (Plaintiffs' Exh. 5, p. 2176) (emphasis in original).

Another GPC investigative memo describes an incident in which two employees engaged in "racially insensitive horseplay"

> "[a] horseplay incident was conceived by Eddie Dean, a white employee and Brian Hill, a black employee to, apparently cause emotional distress to Richard Mitchell, a white employee. The issue concerned a mock racial incident involving a ten year old safety pamphlet, from Dean's toolbox, entitled Facts about Backs which had been changed to read Facts About Blacks. Specifically, Hill pretended to be highly upset at the apparent racial monogram, while Dean appeared to be totally insensitive to Hill's concerns. This charade was carried out over most of a day's work on or around July 5, or 6, 2000.

(Plaintiffs' Exh. 5, p. 2176) (emphasis in original).

Another statement describes the discovery of "some type of voodoo doll that was hanging from a hangman's noose" in the office of Mr. Buddy Phillips, a Caucasian supervisor at the Klondike Training Center. With respect to this "noose," Phillips explained that:

> For his 40th birthday, his children, Marc & Katie, gave him an "old timers doll." He described the doll as being approximately 12" high, W/M, grey hair sticking out from under a little hat, with a red shirt with writing on it pertaining to getting old. Phillips stated that he took the doll to work with him and put it in his office at the South Atlanta Road TMC. During the time frame 93/94, he came to his office one morning and found the doll hanging from his Venetian blinds by a hangman's noose. He just left it there as he felt that his crews were just trying to get a "rise"

> out of him. He in no way felt concerned or threatened by the noose. Phillips stated that the whole time the doll was hanging on the blinds, that no one ever made a comment about it.

(Plaintiffs' Exh. 5, p. 2113).

On July 30, 2000, a knotted rope resembling a noose was found lying on the floor in a corner at Plant Scherer. Another rope, with a loop attached to a pole was found nearby. Statements were taken from employees who felt that the nooses were tied by "copycats" after news of the instant lawsuit was announced. (Plaintiffs' Exh. 5, pp. 2036). In fact, several individuals alleged that Chuck Quick (a white switch man sampler working for Defendant GPC at Plant Scherer) had stated that "if you really want to get things stirred up, you should place a noose somewhere." (Statements of Kathy Russell, Nathaniel Walkers, Jeff Manuel; Plaintiffs Exh. 5). Julius Seawick, a security officer at Plant Scherer stated "I think [the noose] was a copy cat act because of the recent activities in one of [Defendant GPC's] northern facilities." (Plaintiffs' Exh. 5, p. 2049).

After the "nooses" were found in Defendant GPC's Plant Scherer Facility, a memorandum was sent to all employees at the plant which stated, in part:

> Our company policy concerning conduct states "all employees and agents of the company are expected to conduct themselves in a manner consistent with professionalism, decency, dignity, and respect."
>
> Our company policy further states with regard to workplace violence that "acts or threats of physical violence including intimidation, harassment,

> and/or coercion, which involve or affect the company or which occur on company property, will not be tolerated."
>
> As an example, the production and displaying of a hangman's noose is inconsistent with our policy on conduct and our policy on workplace violence. Any employee engaging in such an act will be subject to discipline up to and including termination.

(Plaintiffs' Exh. 5, p. 2063).

Summarizing the noose testimony, the Court finds that it is impossible to say whether any of the nooses were made or displayed out of a desire to offend or intimidate African-American employees. Some of the individuals who made the nooses or were aware of their presence probably knew of the potential for offending or perhaps intimidating African-American employees and perhaps some were insensitive or even callous to this fact. Others, however, probably never even thought of a racial implication. Taking their statements at face value, some African-Americans were offended or intimidated; others did not think of a racial implication. There is no evidence that any of the Named Plaintiffs were exposed to incidents similar to these.

d. Racial Slurs and Jokes

In 111 affidavits of prospective class members, information is provided as to various racial slurs, epithets, jokes, and harassment. Some of these instances are detailed in the brief filed in support of Plaintiffs' motion for class certification at pages 9-10, footnote 5. Almost all

of the 111 affidavits contain some mention of a racist comment.

Defendants do not seek to disprove that the statements were made but point out that within the Defendants' companies there exist working environments at 200 plus locations, such that the affidavits are insufficient to establish the existence of "severe and pervasive conduct that is both subjectively and objectively offensive" as required to establish the existence of a hostile work environment. Defendants also point out that the Named Plaintiffs themselves have experienced little of the conduct or statements referenced in the affidavits, thus undercutting the suggestion that the jokes and slurs represent pervasive conduct. Defendants also point out that they do have channels through which employees can report instances of harassment; also, Defendants point out that their management did respond when the lawsuit was filed.

The Court has reviewed all of the affidavits, and does agree with the Plaintiffs that the statements and conduct referenced therein are unacceptable and that they are demeaning to African-Americans. However, the Defendants are correct that in terms of sheer numbers, given the size of the Defendants' workforce (over 12,000 employees) and the large number of work locations maintained by Defendants, the instances of racial slurs, epithets, jokes and harassment set out in the affidavits are insufficient to warrant an inference of the existence of a hostile environment common to all locations maintained by all Defendants.[39]

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[39] Plaintiffs note in their reply brief, p. 6, n. 4, that they are not seeking certification of a hostile work environment claim. However,

(Continued on following page)

For the same reason, the noose evidence and evidence of racial slurs, jokes[40] and epithets set out in the affidavits are inadequate to establish the existence of a pattern and practice of discrimination.

e. Glass Ceiling

In a further effort to show that the Named Plaintiffs and members of the class share common issues, Plaintiffs argue that the Defendants maintain an "upper glass ceiling" and a "lower glass ceiling" which produce significantly smaller representation of African-Americans in lower, middle and upper management than exists at non-management levels. Defendants do not appear to contest the figures cited in Plaintiffs' brief.

The data provided by Plaintiffs concerning lower representation of African-Americans in management would be relevant to show the effect of discrimination if discrimination in promotions were shown at the management level. This data does not in itself show an intent to discriminate. Also, as previously mentioned, there is no Named Plaintiff who can represent management level employees in promotion or compensation claims.

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they point out, correctly, that the Court can consider this evidence to determine the existence of a pattern and practice of discrimination.

[40] Plaintiffs' Exhibit 6 is a sheet containing a large number of racist jokes. The Court has been unable to determine which of Defendants' locations it came from or which employees saw it. Similarly, the cartoon marked as Plaintiffs' Exhibit 7 (hooded KKK figures singing "I'm Dreaming of a White Christmas") is not identified as to which location was involved or which employees saw the cartoon.

f. Alleged Policy of Ignoring Policies

Plaintiffs argue that while the Defendants have numerous, detailed written policies and procedures pertaining to filling job vacancies, making promotions, and determining compensation levels, the Defendants' actual policy is "no policy". Plaintiffs base this argument primarily on statements made in a deposition by Mark Wolfe, staffing director for SCS. Wolfe testified that SCS promulgated guidelines for GPC, SCS and SCES hiring managers to use. However, he made it clear he had little information concerning the actual application of those policies in the hands of Defendant managers. Basically, he said that SCS promulgated the policies and procedures; the implementation is up to Defendants' managers. In response to various questions by Plaintiffs' counsel, he answered essentially that there was no guarantee that a particular manager would follow the recommended procedure.

Plaintiffs seek to draw too much from the statements made by Wolfe in his deposition. Wolfe did not testify that managers do ignore the policies and procedures established by SCS. Wolfe's testimony is more fairly characterized as asserting lack of knowledge. Particularly when the affidavits of Defendants' managers are considered, it is simply incorrect to say that Defendants utilize entirely subjective processes in making promotions, evaluating employees, filling vacancies, or determining compensation. *See* Defendants' Exhibits 28 through 61. It is true that in applying SCS' recommended procedures managers must make discretionary determinations; but the Court cannot see how this could be avoided. Defendants' employees are not assembly line workers. In addition, it is incorrect to suggest that because Defendants' personnel policies do not dictate a particular result in a given case, there is no

policy. A fairer interpretation of the evidence would be that Defendants do have numerous written procedures and policies regarding hiring, promotions, evaluations and compensation, that there is some variation in the manner in which various managers use these procedures, and that the policies and procedures were never intended (nor could they be) to dictate particular outcomes in individual cases. These facts do not make the decisionmaking process improperly or unfairly subjective, however.

g. Prospective Class Members' Affidavits Establishing Their Own Experiences with Defendants

Plaintiffs have filed 111 affidavits of prospective class members who recite (in addition to the noose testimony and the racial jokes and slur testimony previously discussed) their efforts to obtain promotions or greater compensation, and their belief that Defendants have discriminated against them in denying them the promotions and compensation they believe they should have.

The affidavits as a whole do establish the belief of the affiants that they have been discriminated against, but it is not possible to determine based only on the affidavits that discriminatory decisions were made in the instances recited. In order to make that determination, the Court would need considerably more detailed information as to each of the recited instances. In the Court's opinion, these affidavits serve to undercut Plaintiffs' position on the issue of commonality.

Ninety-one of the 111 affiants are current or former employees of Defendant GPC. Six individuals are or were

employed by Defendant SCES. Twelve stated that they are or were employees of Defendant SCS.

Of the 65 male affiants, 55 hold positions covered by the CBA. Among those 55, three have college degrees. Twenty-five of the 111 total affiants hold degrees from a four-year college.[41] One of the 25, Willie Mathis, holds a degree in engineering.[42]

A representative sampling of the 111 affidavits is as follows. The first three affidavits are from persons who have held or hold management positions with defendants.[43]

Angelin Maines is a former employee of Defendant SCES, where she worked as a project manager. Before her employment with Defendant SCES, Maines obtained a Bachelor of Science Degree in Marketing from American International College in Springfield, Massachusetts. Maines worked for Defendant SCES for five months. She states that "with respect to job opportunities, [Defendant] prevented me from advancing to the same levels or at the same rates as similarly situated Caucasian employees." (Maines Aff., P 3). Maines also asserts generally that she

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[41] John Muckle, a lineman for Defendant GPC, received a Bachelors Degree in Criminal Justice from Albany State College. Greg Jackson, a security coordinator for Defendant GPC, received a B.A. in Theology from the Florida Theological Seminary. Rickey Bailey, an electrician for Defendant GPC, received a Bachelors Degree in Art from Columbus College.

[42] Mathis, a former district power marketing executive for Defendant GPC, states that he received a B.S. in Electrical Engineering, Electronics & Communications from Howard University.

[43] Mathis, Maines and Bowen are the only affiants who held or hold what appear to be "management" positions with Defendants.

"received lower compensation than similarly situated Caucasians performing the same or similar jobs." *Id.*

Therese Bowen has been employed at Defendant GPC for approximately five years. She is currently an account manager at the Customer Care Center in Henry County, Georgia. Bowen, who received an English degree from Spelman College in Atlanta, Georgia, began working for Defendant GPC as a temporary employee in 1995. Bowen's first permanent position was chief PBX operator in Atlanta, Georgia. Subsequently, she obtained the positions of secretary, worker's compensation representative, and support representative I. In August 2000, Bowen was promoted to her current position of account manager. She states that she has been unable to advance to the same levels or at the same rates as similarly situated Caucasians. Bowen alleges that two non-posted positions, in 1999 and 2000, were awarded to Caucasian employees. Bowen also alleges that she has received low performance scores and that she has been reprimanded for making personal phone calls on account of her race.

Willie Mathis was employed as a district power marketing account executive by Defendant GPC for twenty years before he was terminated in May, 1999. Before his employment with Defendant GPC, Mathis obtained a Bachelor of Science in Electrical Engineering, Electronics & Communications from Howard University in 1976. Mathis complains generally that he was treated unfairly, on the basis of race, with respect to job opportunities, compensation and performance evaluations. Mathis states that five Caucasian employees who were hired at the same time as he received promotions one year before he did. Mathis also alleges that he received lower compensation

and lower performance evaluation scores because of his race.

Mack Thomas is currently employed as a lineman for GPC in the operating line department in Carrolton, Georgia. Thomas does not describe his educational background, but states that he began working for Defendant GPC as a utilityman in 1981. In this position, his duties included performing janitorial work and aiding in groundskeeping. (Thomas Aff., P 7). Subsequently, Mack advanced as a helper in 1982, as a truck operator in 1982, and then as a lineman in 1986. Mack states that in 1999 he was twice denied a promotion to a crew leader position in the operating line department. In his affidavit, Mack also states that GPC uses a subjective performance evaluation system in which his manager "is able to inject racial bias" into the evaluation scores. (Mack Aff., P 16).

Norman Wright has been working at Defendant GPC for nineteen years and is currently working as a senior field service representative in Macon, Georgia. Wright, who does not detail his educational background, began working for Defendant in 1981 as a laborer in the opening field department. From 1981 to 1998, he advanced through the following positions: laborer, switchman sampler, laborer in the maintenance department, auxiliary equipment operator, apprentice mechanic, field service representative, helper, and senior field service representative – the position which he obtained in 1997 and currently holds. In his affidavit, Wright contends that, during his career with Defendant GPC, he has been unable to advance to the same levels or at the same rates as similarly situated Caucasians. Specifically, Wright alleges that between 1988 and 1992, he was denied a facilitator position which was awarded to Steve Martin, a white employee.

Anthony Mattox has been working at GPC for approximately sixteen years. He is currently employed as a lineman in Gwinnett County, Georgia. Although he does not describe his educational background, Mattox states that, before his employment with Defendant GPC, he worked for Country Pride and Protein Foods in Gainesville, Georgia on the clean-up crew. At GPC he has held the following positions: winch truck operator, apprentice lineman and lineman. Mattox states that Defendant GPC's subjective interview and testing policies and practices have kept him from advancing, while allowing whites to "readily advance." (Mattox Aff., P 7). Specifically, Mattox alleges that three Caucasian individuals advanced to the position of crew leader in 1995, 1998, and 2000. Additionally, Mattox contends that he has "received unfair and unequal terms and conditions of employment which have resulted in discrimination in job opportunities." *Id.* at 8. Mattox states that he "believe[s] that [his] Caucasian supervisor, Tom Smith, has unfairly disciplined [Mattox] to keep [him] from advancing within the Company." *Id.* As an example, Mattox contends that he received an oral reprimand on one occasion for making an appointment with a private doctor instead of the company doctor with respect to an on-the-job injury. Mattox contends that a Caucasian employee engaged in similar conduct, but that he was not aware of any verbal reprimand in that instance. Therefore, Mattox concludes that "because my supervisor has unfairly singled me out for disciplinary action because of my race, I have been unable to apply for positions for which I was qualified."[44] *Id.* at 9.

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[44] Mattox makes this contention as it is Defendant GPC's policy to prohibit an employee from seeking a promotion while currently on active discipline.

Jesse Nation has been employed by Defendant GPC for approximately 22 years. He is currently employed as a lineman in Austell, Georgia. Nation, who does not detail his educational background, asserts that he has been treated unfairly with respect to job opportunities on account of his race. Nation began working for GPC in 1977 as a member of the line crew (construction & maintenance department). He then advanced as an entry level line helper, a winch truck operator, apprentice lineman, and lineman. Nation asserts that he has been denied promotions through the use of "moving goalposts." Specifically, Nation complains that the company takes other factors, such as test scores, education, and interview results, into promotion considerations other than seniority. Nation contends that if Defendant GPC used seniority as the sole determinant in awarding promotions, he would have obtained the position of foreman in 2000. Instead, Nation states that "because the Company relies on subjective interviews and tests to determine promotions to foreman positions, [he] was denied the job." (Nation Aff., P 11).

Wilhemina Pierce worked for GPC as an administrative support in the billing services department in McDonough, Georgia for approximately eighteen months. Pierce held this position until September 26, 2000 when she resigned. Pierce, who states that she is currently enrolled at Atlanta Technical College, began her employment at GPC as a collection specialist. She states she was treated unfairly with respect to training opportunities because of her race. (Pierce Aff., P 7). Pierce alleges that she was refused proper classroom training with respect to her position as timekeeper. Pierce also alleges that she was subjected to a racially hostile environment during her employment at Defendant GPC. In support of this claim,

Pierce states only that she was not afforded the opportunity to participate in meetings related to her position. (Pierce Aff., PP 11-12). No other detail is provided.

Yolanda L. Roberson is a former employee of Defendant SCS. Roberson, who holds a biology degree from Dennison University, was employed by Defendant SCS as a customer service representative for approximately 23 months. Roberson asserts that she quit her employment because "the stress of race discrimination had become too great." In her affidavit, Roberson contends that she was treated unfairly because of her race with respect to job opportunities and subjected to a racially hostile environment. In her brief employment with Defendant, Roberson alleges that she applied for the positions of technical support, billing analyst, team leader, and dealer coordinator. These positions, according to Roberson, were awarded to Caucasian employees who were less qualified than she. Roberson also alleges that she was discriminated against with respect to compensation and performance evaluations.

Anthony Hagan has been working for Defendant GPC for approximately 28 years. Hagan, who does not describe his educational background, began working for GPC as a laborer in 1972. Subsequently, he obtained the positions of helper, winch truck operator, light equipment operator, serviceman C, serviceman A, and special service representative. In December, 1991, Hagan obtained the position of Investigator I, a position which he currently holds. In his affidavit, Hagan states that, during his employment with Defendant GPC, he has been treated unfairly because of his race with respect to job opportunities. As support for this contention, Hagan states that a Caucasian co-worker was awarded the position of meter foreman for which

Hagan had previously expressed interest. Hagan maintains that this job opening was never posted.

Lillie O. Haley was employed by Defendant GPC for approximately four years before voluntarily leaving the company in December, 1998. (Haley Aff., P 2). In her affidavit, Haley states that, during her employment she "was treated unfairly because of [her] race with respect to job opportunities, compensation, and the terms and conditions of [her] employment." *Id.* at 3. Haley, who received an associate degree in accounting from the Atlanta Business College in 1977, began working for GPC in 1994 as a Teleservice Representative in the Marketing Department at the Ralph McGill office in Atlanta, Georgia. In 1996, she was transferred to a temporary full-time position as an energy advisor. In March, 1997, she was transferred to another temporary full-time position as a residential & sales field representative. After concluding that Defendant GPC would "never let [her] advance because of [her] race," Haley quit in December of 1998. *Id.* at 19. In her affidavit, Haley complains that she was not offered a permanent full-time position on the basis of her race. Haley states that when she inquired as to why she was not chosen for a specific position, her manager informed her that her lack of a certain skill or attribute was the deciding factor. Haley also states that new, permanent full-time Caucasian employees received a higher rate compensation. This discrepancy, according to Haley, was based on her race. *Id.* at 13.

Kimberly Turner was employed with Defendant SCS as a computer operator I in Atlanta, Georgia for approximately three years. Turner was fired in January, 2000. In her affidavit, Turner asserts that her termination was as a result of racial discrimination in disciplinary action.

Specifically, she states that "on January 12, 2000, I was terminated for sending an e-mail to another employee by mistake." In her affidavit, Turner states that Marcia Schultz, a Caucasian employee who engaged in similar conduct was disciplined less harshly. Turner states that Schultz allowed her boyfriend, a former employee, to use her computer. (Turner Aff., P 15). As a result Schultz was given a two week suspension. Although Turner does not describe the content of the e-mail which she was disciplined for sending, Named Plaintiff McCullers stated in her deposition testimony that Turner was fired for sending a pornographic video and/or pornographic photograph to members of upper level management and "all over, in different parts of the Company." (McCullers Depo., p. 60).

Howard Harden, III has been employed by Defendant GPC for approximately 22 years. Harden received a B.A. in Divinity from Lahario Bible Institute in Augusta, Georgia. Harden alleges that he has been treated unfairly because of his race with respect to job opportunities and been subjected to a racially hostile environment. (Harden Aff., P 3). Harden's first position at GPC was lineman helper. In 1979, Harden was promoted to the position of field service representative in Augusta, Georgia, a position which he currently holds. Harden states that he has applied for and been denied several promotions for which he was qualified. For instance, Harden applied for the position of meterman C for which he was required to take a test. Harden failed the test and the position was awarded to another individual with less seniority. *Id.* at 8. Harden also states that he has been subjected to a racially hostile environment. In support of this allegation, Harden states that Defendant GPC sued him because he lost a $30 sealing iron and required him to take a day off without

pay in order to compensate his employer for losing a piece of their equipment. Harden contends that several Caucasian co-workers have lost equipment and not been sued.

Bobby Couch is a current employee of Defendant GPC where he has been working for 27 years. Couch received a Technical Degree in Automotive Mechanics from Coosa Valley Technical School in Rome, Georgia in 1969. Couch accepted a job with Defendant GPC in 1973 as a "C" Class Mechanic at the Rome Division. In 1975, Couch obtained the position of "B" class mechanic based on his seniority. In 1982, Couch was promoted to the position of journeyman mechanic, which he currently holds. In his affidavit, Couch asserts that he has been treated unfairly because of his race with respect to job opportunities and been subjected to a racially hostile work environment. Specifically, Couch contends that he has applied for and been denied several promotions, including crew-leader, for which he feels he was qualified.

Willie Geter has worked for Defendant GPC for fifteen years. Geter, who does not disclose his educational background in his declaration, is currently employed as a fork lift driver in Newnan, Georgia. Geter asserts that he has been treated unfairly because of his race with respect to job opportunities. Geter also states that he has been subject to a racially hostile environment. (Geter Decl., P 3). From 1979 to 1989, he held the positions of laborer, meter reader, and senior meter reader. *Id.* at P 10. Geter states that, in 1993, he applied for the lead man position of senior service representatives in the meter reading department, but that the position was awarded to a Caucasian employee with less experience.

Jackie Edwards, who is currently working as a mechanic in the maintenance department in Cartersville, Georgia, has been employed by GPC for approximately thirty years. Edwards, who does not describe his educational background, asserts that he has been treated unfairly because of his race with respect to job opportunities. Edwards also states that he has been subject to a racially hostile environment. In his affidavit, Edwards contends that he has applied for and been denied promotions for which he was qualified. Specifically, Edwards states that in 1999 and 2000, he applied four separate times for promotion to the storekeeper position. "In many cases," Edwards alleges, "[Defendant GPC] awards these positions to less qualified Caucasian employees." (Edwards Aff., P 10). In support of his assertion that he has been subjected to a racially hostile environment, Edwards alleges that his co-workers have posted Confederate insignias such as the "Rebel Flag" in the workplace.

Paul Jackson has been working for Defendant GPC for approximately twenty years and is currently employed as a customer service representative at the Metro Customer Service Center in McDonough, Georgia. Jackson, who obtained an Associate degree in Business Administration from Atlanta Metropolitan College in 1979, began his career with GPC in 1980 as a customer service representative C. Six months later, he was promoted to customer service representative B. In 1980, Jackson obtained the position of customer service representative A, a position which he still holds. In his affidavit, Jackson states that he has been treated unfairly because of his race with respect to job opportunities and discipline. (Jackson Aff., P 7). Specifically, in 1998 Jackson was absent from a class which he was required to attend. As a result, he was

placed on the second level of positive discipline for his absence. However, Jackson states that, "on countless occasions," when a Caucasian employee was absent from a mandatory meeting, "the employee conducting the class would generally phone or go to that employee's work area and request that they join the meeting." *Id.* at 7. However, Jackson asserts that, because of his race, he was "not afforded a reminder that the meeting was taking place." *Id.* Because of his disciplinary record, Jackson was unable to apply for a promotion to the metro customer service expert group. Jackson also maintains, without citing a specific example, that he has received unfairly low performance evaluation scores because of his race. *Id.* at 9.

Summarizing, 111 prospective class members have filed affidavits which evidence their belief that Defendants have treated them unfairly on account of their race. Because the Court has no other information concerning the details of these complaints, it is not possible to even estimate whether all, some or none of the affiants' complaints are valid. The Court does observe that while most of the allegations are rather general, resolving the validity of each claim would be a fact-intensive process. Also, while the existence of even one valid claim would be too many, at the same time 111 affiants out of a group of 2400 individuals is too low a proportion to prove a pattern and practice of discrimination.

h. Indifference of Senior Management

Finally, Plaintiffs argue that the indifference of Defendants' senior management to race discrimination supplies an element of commonality sufficient to warrant a determination that the Named Plaintiffs and all prospective class

members have been adversely affected in a discriminatory fashion.

Ironically, this section of Plaintiffs' brief points out that in response to findings of the Office of Federal Contract Compliance in 1994, GPC agreed to implement new procedures including the JobNet system, the structured interview guidelines, use of selection committees, and use of external recruitment and candidate services. Because the changes implemented did not produce the result of closing the salary and promotion gap between Caucasians and African-Americans, and because the Defendants' own self-study ("The Diversity Report Card") was critical of the extent of improvement, and because of the inability of Defendants' top representatives to answer certain deposition questions, Plaintiffs argue that the indifference of senior management is at such a level that the Court should find a common thread of "indifference" to define a cohesive class. It seems to the Court that Plaintiffs overreach in this argument.

i. Legal Discussion and Conclusion

The controlling case law interpreting Rule 23's requirement of commonality in employment discrimination cases is set forth in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982), plus several decisions of the United States Court of Appeals for the Eleventh Circuit, *Nelson v. United States Steel Corp.*, 709 F.2d 675 (11th Cir. 1983), *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), and *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992).

In *Falcon*, the Supreme Court reversed a lower court ruling that allowed plaintiff, who alleged he had been denied a promotion on account of his national origin, to maintain a class action on behalf of all Mexican-American applicants for employment without identifying questions of law or fact common to the claim of the plaintiff and that of the class members. The Supreme Court noted that plaintiff had a meritorious promotion claim, but it held that this did not entitle him to represent class members who had hiring claims when plaintiff had failed to make a factual showing on the issue of commonality. The Court referred critically to the "across the board" rule which had previously allowed a victim of race discrimination to attack all unequal unemployment practices committed by an employer, regardless of whether plaintiff himself had been injured by such practices, referring in particular to *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (11th Cir. 1969).[45]

Falcon did leave open a window of opportunity for plaintiffs seeking certification, however:

> If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of

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[45] The Supreme Court quoted with approval Judge Godbold's specially concurring opinion in *Johnson*, wherein Judge Godbold expressed concern about potential unfairness to class members bound by an adverse judgment if the class definition was overly broad. Judge Godbold warned courts not to assume that "all will be well for surely the plaintiff will win and manna will fall on all members of the class." *Johnson* at 1127.

> Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same face or national origin is insufficient to establish his standing to litigate on their behalf all possible claim of discrimination against a common employer.

Falcon, 457 U.S. at 159, n. 15 (Emphasis supplied).

In Nelson, the Court of Appeals affirmed the trial court's holding that commonality had not been established where the plaintiff had not established that the discrimination she allegedly suffered was "typical or relatedly, that a policy of race discrimination pervaded U. S. Steel's hiring practices." 709 F.2d at 679. The Court noted in footnote 9:

> The plaintiff's task in establishing the requisite commonality or typicality is more difficult where, as here, disparate treatment is alleged. Disparate impact cases typically involve readily identified, objectively applied employment practices such as testing procedures. The common reach of such practices is likely to be clearer and easier to establish than a general policy of race discrimination alleged to unite otherwise factually dissimilar disparate treatment claims. (Footnotes omitted).

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify an across the board class of both applicants and employees if the discrimination manifests itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. (Footnote omitted) (emphasis supplied).

The Court of Appeals found that while the plaintiff had alleged a general policy of race discrimination, she had produced no reliable evidence to back up that claim. Therefore, the suit would degenerate into a series of mini-trials, which would be contrary to Rule 23's goal of judicial economy.

In *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), the Court of Appeals vacated a district court order certifying a class, finding in part that the commonality requirement of Rule 23 had not been met when plaintiff, a rejected applicant for a clerical position, sought to represent those who had failed to pass a test required for another position and neither of the *Falcon* exceptions was met.

In *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir. 1992), the Court of Appeals affirmed the trial court's denial of class certification, finding that plaintiffs were seeking certification of a class "challenging every employer practice with respect to that class", *id.* at 1570, and finding that plaintiff had not established that anything other than race was common to their claims.

While Plaintiffs may intend for individual Named Plaintiffs to represent different subgroups within the

prospective class, neither the Complaint nor the motion for class certification spells out the parameters of each Named Plaintiff's representative capacity with respect to any subgroup. It is not obvious how, or whether, individual Named Plaintiffs could appropriately represent particular subgroups. Thus, the Court considers that for all intents and purposes this is an "across the board" case which does not meet Rule 23's commonality requirement unless one of the *Falcon* exceptions recognized by the Supreme Court is met.

Plaintiffs have made vigorous efforts to establish a pattern and practice of discrimination or a disparate impact, either of which would establish essentially a presumption of discrimination affecting the entire class. Even when Plaintiffs' pattern and practice evidence is considered as a whole, however, it is not enough to convince the Court that race discrimination is Defendants' "standard operating procedure" as defined by Teamsters. Plaintiffs' evidence is insufficient in quantity and quality to make this determination, given the size and geographic scope of the Defendants' operations and the large number of employees who work for Defendants.

Similarly, Plaintiffs' efforts to establish that Defendants have an "entirely subjective hiring, promotion and compensation process" falls short. Plaintiffs' evidence does show that Defendants' managers exercise discretion in these areas, but that is different from an "entirely subjective decisionmaking process." Finally, Plaintiffs' statistical evidence regarding the existence of an adverse impact is unconvincing. For one thing, the evidence does not show proof of a convincing nexus between the claimed policies and the outcome due to its failure to adequately measure the treatment of similarly situated individuals. Secondly,

the extent of adverse outcome is not proven with convincing force by the expert testimony for the same reason.

The Court recognizes the enormity of the task borne by Plaintiffs to prove pattern and practice or adverse impact; however, the size of the burden is proportional to the task chosen by the very wide-ranging nature of this lawsuit.

C. Adequacy of Representation

For the reasons previously discussed, the Court does not believe that the Named Plaintiffs adequately represent the absent class members. The Court does find that Plaintiffs' counsel are capable and experienced lawyers who would more than adequately represent the class, were a class certified.

2. Rule 23(b)(2)

Under Rule 23(b)(2), the Court may certify a class when the requirements of Rule 23(a) are met and, in addition, the Court determines that the Defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2), Fed. R. Civ. P.

When a class is certified under Rule 23(b)(2), the outcome of the litigation binds all members of the class, regardless of whether the outcome is favorable or unfavorable. Class members have no right to "opt out". *See* Rule 23(c)(3). Under controlling precedent, back pay is considered equitable relief and therefore can be awarded to class members in a case certified under Rule 23(b)(2). *Pettway v.*

American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974). The added wrinkle here, however, is that Plaintiffs also seek compensatory and punitive damages – neither of which were available under Title VII when *Pettway* was decided, and both of which are classic forms of legal – not equitable – relief.

In *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2000), the Court of Appeals held that damages can only be awarded in a (b)(2) case where the damages sought are "incidental" to the claims for injunctive and equitable relief. Such "incidental damages" would be those group damages inherent in a finding of Defendants' liability to the Plaintiffs' class as a whole.

Following *Murray*, the Court finds this case cannot be certified under Rule 23(b)(2). Plaintiffs seek not only back pay, but also compensatory damages and punitive damages which would require highly individualized fact findings and which could not be termed merely incidental to an injunction or declaration in the class's favor.

As an alternative, Plaintiffs ask the Court to certify the equitable and legal claims of the class under Rule 23(b)(2), but to allow opt-outs regarding damages claims. Plaintiffs note that this Circuit has recognized the discretionary power of the district court to allow opt-outs in a 23(b)(2) case when "desirable to protect the interests of absent class members." *See Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981 Unit B). Also, in *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), the United States Court of Appeals for the Eleventh Circuit held that the district court had abused its discretion by refusing to approve an opt-out procedure in a 23(b)(2) case which had been settled for a payment of an aggregate sum to the

class as a whole. The Court of Appeals' stated rationale was that even though the class had been certified under Rule 23(b)(2), it actually was "functionally more similar" to a Rule 23(b)(3) case. *Id.* at 1154.

In the Court's opinion, neither *Penson* nor *Holmes* entitles the Plaintiffs to 23(b)(2) certification of damages claims with an opt-out feature for compensatory damages claims. *Penson* merely stands for the proposition that a district court had discretion to allow opt-outs in a case involving claims for back pay as well as injunctive relief. No compensatory damages claims were involved. *Holmes*, which also did not involve compensatory damages, was a case which had been settled. The Court of Appeals noted that in the settlement posture, the case was more like a 23(b)(3) case in which common issues predominated. Most importantly, these cases predate the Civil Rights Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071 (1991), which added the right to seek compensatory and punitive damages and the right to jury trial in cases where these damages are sought.

Assuming that the Court does have the discretion to certify a class under Rule 23(b)(2) for both injunctive relief and damages, with individual opt-out rights as to damages claims, it would decline to do so. As stated elsewhere, individualized issues predominate in this case to such an extent that management of the case would be exceptionally difficult.

Plaintiffs next argue that issues affecting money damages do not predominate over issues of injunctive and declaratory relief because the latter forms of relief are more meaningful to the class. No express predominance requirement appears in Rule 23(b)(2), though the Advisory

Committee Notes state that "the subdivision [(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Adv. Comm. Notes, 1966 Amendments, Fed.R.Civ.P. 23. Plaintiffs argue that while the Notes are not legally binding, a policy of liberal interpretation of civil rights law favors a reverse inference that money damages can be collected by a (b)(2) class so long as money damages are not the predominant form of relief. Plaintiffs argue here that money damages do not predominate because the proposed injunctive/declaratory relief – seeking programmatic changes in Defendants' personnel policies – is more important in the long run than individual monetary awards.

This argument, however, fails on three points. First, there is no binding precedent supporting Plaintiffs' "balancing" approach to (b)(2) certification in the Eleventh Circuit. In fact, the Eleventh Circuit has held specifically that in cases where the money damages are not a purely "group remedy," the damages claims do not predominate over any injunctive relief sought by the class. *Murray*, 244 F.3d at 812. The Court notes that in the *Murray* case the Eleventh Circuit did not evaluate the "importance" of one type of relief over the other. Rather, the Court found that the simple fact that plaintiffs sought individual monetary relief prevented certification.

Secondly, Plaintiffs have given the court little information as to what sort of injunctive or declaratory relief would be of such clear importance as to warrant a determination that equitable issues predominate over issues of damages. Plaintiffs merely state in the Complaint that they seek entry of an injunctive order "to end Defendants' discriminatory practices and to prevent current and future

harm to the Named Plaintiffs and the class", and of a declaratory order "that Defendants' acts and practices as set forth herein are in violation of the laws of the United States." Third Amended Complaint, p. 59. It does not seem, however that orders which merely reiterate general existing legal principles would be of the level of significance urged by Plaintiffs. Also, while Plaintiffs' briefs refer to needed "programmatic changes", it is not clear what discrete changes Plaintiffs have in mind which could be directed in a clear, enforceable order. Thus, the record in its present state does not convey why injunctive or declaratory relief would be of more value than money damages to prospective class members, assuming this were a legitimate consideration.

Finally, to some members of the prospective class (especially those who no longer work for Defendants), the injunctive and declaratory relief may be of far less importance than monetary damages.

For the foregoing reasons, the Court does not find that the sought-after injunctive/declaratory relief is of greater value or importance than the sought-after monetary relief. Further, the Court believes that such a balancing approach is inherently subjective, and in the absence of binding precedent requiring such an approach, the Court would be disinclined to use it.

Since a jury trial has been demanded in this case, the parties are entitled under the Seventh Amendment of the U.S. Constitution to have all factual legal issues determined by a single jury before decisions on equitable matters are made by the Court. *Ross v. Bernhard*, 396 U.S. 531, 538-39, 24 L. Ed. 2d 729, 90 S. Ct. 733 (1970). The authorities relied upon by Plaintiffs to argue that claims

for compensatory damages can be tried in an employment discrimination case certified under (b)(2), with findings on damages deferred until resolution of liability are not applicable and are not workable. Unlike the situation which predated the 1991 Act, the Court cannot conduct a bench trial on pattern and practice or disparate impact issues without a jury where a jury is demanded. Also, if these issues were resolved adversely to the Defendants, it would then be necessary for the jury to hear and rule on all individual claims for compensatory and punitive damages. The prospect of trying possibly two thousand of these claims before a single jury is simply absurd.

3. Rule 23(b)(3)

The Court also finds that class certification is inappropriate under Rule 23(b)(3). The two essential requirements of Rule 23(b)(3) are that the common questions "predominate over any questions affecting only individual members" and that the class action procedure be "superior . . . fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "In other words, 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.'" *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (*citing Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1557-58 (11th Cir. 1989) (*quoting Nichols v. Mobile Bd. Of Realtors, Inc.*, 675 F.2d 671, 676 (5th Cir. Unit B 1982))).[46] The predominance inquiry under Rule

[46] In *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the Eleventh Circuit adopted as binding precedent decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

23(b)(3) is "far more demanding than Rule 23(a)'s commonality requirement." *Id.* (*quoting Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997).

In Jackson, the Eleventh Circuit found an abuse of discretion in a district court's decision to certify a class alleging a nationwide racially discriminatory practice of renting vacant rooms and providing housekeeping services. Plaintiffs argued that the issue whether defendant Motel 6 had a practice or policy of discriminating against patrons and employees on the basis of race predominated over individual issues. *Jackson v. Motel 6 Multipurpose*, 130 F.2d 999, 1005 (11th Cir. Fla. 1997). The district court had agreed with the plaintiffs and found that class resolution would be more efficient and cost-effective. Reversing the district court, however, the Eleventh Circuit noted that the "plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination." *Id.* at 1006. Thus, the Court found that most of the plaintiffs' claims would stand or fall on the case-specific issues, rather than a finding of a pattern or practice of discrimination.

Similarly, in *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1235-36 (11th Cir. 2000), the Eleventh Circuit Court of Appeals reaffirmed its holding in Jackson and emphasized the need for singularity of claims in the class action context.[47] Because there were too many "individualized issues, relative to the one common issue of

[47] The Court notes that *Rutstein* was not an employment discrimination case, but its reasoning is relevant to the instant case. *Id.* at 1239.

whether [Defendant] maintains a policy or practice of discrimination," the Court found that the plaintiffs failed to meet the 'predomination' requirement of Rule 23(b)(3) and therefore could not proceed as a class with their claims arising under Section 1981. *Id.* at 1235.

In the present case, Plaintiffs seek certification in part modeled after the United States Supreme Court's decision in the *Teamsters* decision, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977), in which the Court found that the question of whether defendants have engaged in a pattern and practice of discrimination is a critical factor which may connect the claims of class members.[48] *Id.* at 336-39. However, the pattern and practice standard described in *Teamsters* is not met in the instant case. The *Rutstein* Court noted that the *Teamsters* rationale was appropriate where the "number of African-American and Spanish-surnamed persons hired for line driver positions approached the 'inexorable zero'" or where "'in the 37 years preceding the institution of the lawsuit the employer did not have a single black [person] on its payroll.'" *Rutstein*, 211 F.3d at 1236-37 (*quoting Teamsters*, 431 U.S. at 342, n.23, and *Paradise v. Prescott*, 767 F.2d 1514, 1529 (11th Cir. 1985); *compare Reynolds v. Roberts*, 202 F.3d 1303, 1319 n. 27 (11th Cir. 2000) ("It is undisputed that [defendant] hired thousands of blacks" and promoted many of these individuals to higher positions. "In light of this, there can be no inference that [defendant's] policies and practices

[48] The *Teamsters* case did not involve class certification under Rule 23, but instead involved a statutory procedure allowing the Attorney General to bring a civil action alleging violations of Title VII. *Teamsters*, 431 U.S. at 328.

injured every member of the plaintiff classes by discriminating against him or her on account of race.").

Ultimately, the Court in *Rutstein* concluded that, in any class action context, "Serious drawbacks to the maintenance of a class action are presented where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts." *quoting McCarthy v. Kleindienst*, 239 U.S. App. D.C. 247, 741 F.2d 1406, 1412 (D.C. Cir. 1984); *see Andrews v. American Telephone & Telegraph Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) (in action against telephone companies' provision of 900-number services in which plaintiffs claimed, *inter alia*, that companies were violating gambling laws, Court held that "aspects of each 900-number program will have to be individually examined to determine whether a particular program actually involves gambling or runs afoul of state gaming laws").

Similarly, as previously discussed, Plaintiffs rely on statistical evidence to provide over-arching proof of discrimination which would connect class members' claims. However, because of limitations in Plaintiffs' proof, the statistical evidence is insufficient to show that Defendants' personnel policies disparately impacted the Plaintiff class, or that Defendants had a general policy of discrimination.

Even if Plaintiffs' pattern and practice or disparate impact theories were viable, however, the Court does not believe that certification under Rule 23(b)(3) would be appropriate. The factual detail needed to determine both liability and individual damages claims for perhaps 2000 individuals would overwhelm the common elements of proof.

Plaintiffs assert that "class treatment of this controversy is clearly superior to resolution through the filing of a host of individual actions." (Plaintiffs' Brief, p. 58). The Court finds that class certification in the instant case, however, would lead to an unmanageable and fragmented series of individual claims. Defendants contend, and the Court agrees, that severing claims or bifurcating liability and damages, as Plaintiffs suggest, will not solve these unique problems. Instead, as noted above, such individual claims will ultimately turn on the particular facts and circumstances of each prospective class member's claims, including whether the individual was subjected to the alleged disparate treatment or unlawful harassment as well as a calculation of individualized damages with respect to these divergent claims.

In this case, the manageability concerns associated with the individualized nature of the prospective class outweigh any benefit attained from class action litigation as prescribed by Rule 23 of the Federal Rules of Civil Procedure. As such, the Court finds that class treatment is not appropriate.

3 [sic]. Hybrid Claim

Plaintiffs also suggest, as an alternative, that the court certify claims for equitable relief under (b)(2) and claims for damages under (b)(3). This variation, however, adds no new options to those already discussed. The fact is that common elements of proof would not predominate in any event so as to meet the requirements of (b)(3).

VIII. SUMMARY

Because neither the requirements of Rule 23(a) or (b) are met, Plaintiffs' motion for class certification is hereby DENIED. Plaintiffs' request for an evidentiary hearing on the certification issues is also DENIED. Plaintiffs' motion to strike the report of Dr. Ronald Sims and Defendants' motion to strike the second report of Dr. Madden are DENIED.

SO ORDERED, this 11th day of October, 2001.

/s/ ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 03-12230-AA

CORNELIUS COOPER,
MICHAEL EDWARDS, et al.,

Plaintiffs-Appellants,

versus

SOUTHERN COMPANY,
GEORGIA POWER
COMPANY, et al.,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19___, ____ F.2d ____).

Before: ANDERSON, CARNES and MARCUS, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Bank are DENIED.

ENTERED FOR THE COURT:

[ENTERED April 15, 2005]

/s/ Stanley Marcus
United States Circuit Judge

No. 03-12230

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Cornelius COOPER, Michael EDWARDS,
Charcella GREEN, Patricia HARRIS,
Sarah Jean HARRIS, Irene McCULLERS,
and Carolyn WILSON,

Plaintiffs-Appellants,

v.

SOUTHERN COMPANY, GEORGIA POWER
COMPANY, SOUTHERN COMPANY
SERVICES, INC., and SOUTHERN COMPANY
ENERGY SOLUTIONS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia (Atlanta)
Hon. Orinda D. Evans

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

NICHOLAS M. INZEO
Acting Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

DORI K. BERNSTEIN
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY
COMMISSION
Office of General Counsel
1801 L Street, N.W.,
Room 7046
Washington, D.C. 20507
(202) 663-4734

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, I hereby certify that the following persons or entities have an interest in the outcome of this case:

1. Chris Arbery, Esq.
2. Emmet Bondurant, Esq.
3. Dori Bernstein, Esq.
4. Johnnie Cochran, Jr., Esq.
5. Cornelius Cooper
6. Von DuBose, Esq.
7. Michael Edwards
8. Equal Employment Opportunity Commission (EEOC)
9. The Honorable Orinda Evans
10. Georgia Power Company, Inc.
11. Richard Gerakitis, Esq.
12. J. Keith Givens, Esq.
13. Charcella Green
14. Ashley Hager, Esq.
15. Patricia Harris
16. Sarah Jean Harris
17. Nicholas Inzeo, Esq.
18. Irene McCullers
19. Ray Persons, Esq.
20. Stephen Riddell, Esq.

21. Steven Rosenwasser, Esq.
22. Hezekiah Sistrunk, Jr., Esq.
23. Philip Sklover, Esq.
24. Southern Company, Inc.
25. Southern Company Energy Solutions, Inc.
26. Southern Company Services, Inc.
27. Michael Terry, Esq.
28. Joshua Thorpe, Esq.
29. Carolyn Wheeler, Esq.
30. Carolyn Wilson

Pursuant to Fed.R.App.P. 26.1, the EEOC, as a government agency, need not file a corporate disclosure statement.

/s/
Dori K. Bernstein

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STATEMENT OF INTEREST

The EEOC administers and enforces Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000e *et seq.* This appeal involves the proper application of Fed.R.Civ.P. 23 to Title VII systemic discrimination claims, and the quantum of evidence required to proceed to trial on pattern-or-practice and disparate impact claims challenging a system of subjective, discretionary decisionmaking. Because the ability of private litigants to challenge systemic discrimination on a class-wide basis is vital to the effective enforcement of Title VII, and because the legal standards and evidentiary burdens for proving systemic discrimination are the same in government enforcement actions as in

private class litigation, the EEOC offers its views to the Court. *See* Fed.R.App.P. 29(a).

STATEMENT OF THE ISSUES

Whether the district court abused its discretion in denying class certification under Fed.R.Civ.P. 23(b)(2) to litigate claims of systemic racial discrimination caused by defendants' common pay and promotion policies.

Whether the district court erred in granting summary judgment against plaintiffs' claims that defendants' common policy of affording managers unmonitored discretion to use subjective criteria in making compensation and promotion decisions fostered a pattern or practice of disparate treatment, or caused an adverse disparate impact, against African-American employees.

STATEMENT OF FACTS

Defendants-appellees are Southern Company and subsidiaries Georgia Power Company (GPC), Southern Company Energy Solutions (SCES), and Southern Company Services (SCS).[1] *See Cooper v. Southern Co.*, 205 FRD 596 (N.D. Ga. 2001).[2]

In 1995, SoCo consolidated the human resources (HR) functions – including staffing, compensation, and EEO compliance – of each of its subsidiaries into a centralized

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[1] Except where identification of a particular defendant company is relevant, defendants will be referenced collectively as "SoCo."

[2] References to the district court's rulings will cite the published decisions. All other record references correspond to numbered docket entries (DE) on the district court docket.

operation at SCS "to implement common compensation and promotion policies and practices between the companies." DE141, Ex.B, ¶ 3; 205 FRD at 600 (finding GPC, SCES, and SCS "utilize common compensation and promotions policies promulgated and administered by . . . SCS").

Under SoCo's personnel policies, non-union jobs[3] are normally filled internally through posting on SoCo's "computer intranet system known as 'JobNet,' which is accessible to virtually all [SoCo] employees." *Id.* at 600. Mark Wolf, SoCo's Staffing Director, oversees the SCS department that provides staffing "infrastructure" for all SoCo subsidiaries. DE117, Ex.9 at 5-7. While SCS has developed detailed instructions and procedures for job posting, applicant screening, interviews, and candidate selection, *see* DE119, Ex.36-42, Wolf testified that SoCo's policy is to "encourage" managers to follow these "guidelines" for filling vacancies, but "there is no requirement" that they do so. DE117, Ex.9 at 67. Wolf was unaware of any effort by SoCo or its subsidiaries to monitor or control the internal hiring and promotion process to ensure managers exercise their discretion in a non-discriminatory manner and use job-related criteria to select employees for promotion. *Id.* at 69-70.

SoCo's internal hiring policies afford each hiring manager discretion to decide: whether to consult HR in

[3] Some of GPC's employees are covered by a collective bargaining agreement (CBA) with the International Brotherhood of Electrical Workers. The terms of the CBA govern promotion to positions covered by the CBA, and compensation of employees holding CBA-covered positions. *See* 205 FRD at 599. Plaintiffs do not claim CBA-covered promotions and compensation are racially discriminatory. *See* DE141 at 5-6.

filling a vacancy;[4] whether to post an opening on JobNet;[5] what job qualifications to list in the posting, DE117, Ex.9 at 59; what criteria to apply in screening applicants for interviews, *id.* at 52-53; whether to use a selection committee, *id.* at 84; whether to follow "structured interview" guidelines, *id.* at 67; what to ask interviewees, *id.* at 75, 82; whether to ask the same questions of each candidate for the same position, *id.* at 77; and which candidate to hire. "Even in cases where a selection committee is used, the manager is not required to accept the committee's recommendation." 205 FRD at 60-0.

SoCo further entrusts individual managers with discretion to promote employees without posting a vacancy by: awarding "promotions within a progressive job family"; identifying an employee with "demonstrated leadership potential" and providing him "with opportunities to obtain experience in other areas" through a "developmental move" to a new position; and "re-evaluat[ing] jobs within their departments if they determine that the actual skills are above or below those anticipated by the job criteria." *See* 205 FRD at 600-01; DE119, Ex.36 at E212-13.

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[4] DE119, Ex.57 at L1314 (1998 SoCo audit found "HR business reps have minimal involvement in selection process either through facilitation or consultation services").

[5] Internal SoCo audits reveal that in practice many jobs are filled without posting. *See* Ex.57 at L1314 (1998 audit revealed "high level of inconsistency in hiring process, including the use of JobNet and/or retaining interview records, and selection documentation"); Ex.62 at N1895 ("recent audit" of "approximately 1300 job transactions" found "50% were not posted and 50% had incomplete or no documentation"); Ex.63 at J5841 (spreadsheet showing 39.9% of 1342 jobs filled were posted).

SoCo employees in non-CBA jobs are compensated pursuant to "a common job, salary or pay grade system . . . formulated by . . . SCS for non-exempt employees (grades NE1 through NE9) and exempt employees (grades E1 to E15)." 205 FRD at 600.[6] SoCo's pay grade system features broad and overlapping salary ranges. In 1998, for example, "grade E5 ranged from $42,396 to $67,837. Grade E3 was approximately $24,020 to $54,432." *Id.* Under SoCo's pay grade system, each job may be slotted at more than one grade, authorizing compensation within multiple salary ranges. *Id.* at 612 n.29. A job posted in Grades 3-5 in 1998 could thus carry an annual base salary of anywhere between $24,020 and $67,837.

Steven Wilkinson, SoCo's Compensation Manager, heads the SCS department that develops and administers compensation policies for SoCo subsidiaries, including GPC and SCES. *See* DE117, Ex.8 at 18-21. According to Wilkinson, SoCo delegates to individual managers discretion to assign job grades and set base salaries, *id.* at 42-45, and "there are no set standards, there's no formula as such to follow," and no controls in place "to ensure a manager does not discriminate" by assigning lower job grades to black employees. *Id.* at 195-96. Nor are there standards or controls to ensure managers assign the same pay grade to jobs that entail the same duties. *Id.* at 201. Each manager also has discretion to decide the percentage increase over

[6] The "non-exempt" and "exempt" designations indicate whether a position is subject to the wage and hour requirements of the Fair Labor Standards Act. *See* 205 FRD at 599. SoCo further divides non-exempt employees into "technical" and "non-technical" designations, and has established job grades and salary ranges for each. *See* DE119, Ex.72 at E675-79.

base salary an employee will receive upon promotion to a different job. *Id.* at 98, 103.

In addition to base salary, employees in nearly all non-CBA jobs are eligible for annual merit pay increases and lump sum incentive bonuses under SoCo's common Performance Pay Plan (PPP). *See* 205 FRD at 601. While SoCo provides "general considerations" and "helpful hints" for awarding compensation under these common plans, *see* DE119, Ex.73 at F664, F669 & Ex.74, "managers and supervisors within individual departments have discretion to determine how to allocate individual merit increases" and incentive bonuses among subordinate employees. 205 FRD at 601.

Wilkinson testified that SoCo affords each manager "broad . . . discretion to establish a methodology" to distribute bonuses and merit increases by ranking the comparative contributions of employees based on performance. DE117, Ex.8 at 147-48, 161, 202-03. Under SoCo's policy, Wilkinson agreed, a manager "could establish different criteria to evaluate" five different employees holding the same job under his supervision. *Id.* at 151. According to Wilkinson, "there's no review" by HR "of the performance evaluations or the documentation" to determine whether managers are using job-related factors to evaluate employees. *Id.* at 153. Aside from requiring a manager to stay within his departmental budget, Wilkinson testified, "there are no absolute limits" on each manager's discretion to determine the size of each employee's annual pay increase. *Id.* at 201-02

Seven African-American employees sued SoCo in July 2000, asserting individual and class claims of race discrimination in violation of Title VII and 42 U.S.C. §1981.

See 205 FRD at 597-98. The named plaintiffs variously allege that they were denied positions, promotional opportunities, or compensation based on race pursuant to SoCo's common pay and promotion policies. *See id.* at 602-05; DE141, Ex.E. The complaint sought the full range of declaratory, injunctive, equitable, and monetary relief provided by law, and demanded a jury trial. DE62 at 59. Plaintiffs sought class certification to litigate claims of systemic race-based disparate treatment and adverse impact caused by SoCo's policies for awarding compensation in and promotion to non-CBA jobs. The proposed class included approximately 2,400 African-Americans employed by SoCo at any time from July 1998 to the present. 205 FRD at 598-99.

To support class certification, plaintiffs submitted documentary and testimonial evidence of SoCo's policies and practices on internal hiring, promotions, and compensation, *see* DE117 & 119, and SoCo-generated documents indicating racial disparities in these areas during the relevant time period. A 1998 audit of SoCo's internal hiring practices disclosed that "interview pools had a majority white male population; records indicate that when diverse applicant pools are provided, hiring managers are interviewing primarily white male candidates." DE119, Ex.57 at L1314; *see also* Ex.63 at J5841 (internal SoCo spreadsheet analysis showing that of 1342 positions filled, 13.6% of selections were from a "diverse pool" of candidates). The audit further showed that 98% of "promotions resulting from job reevaluations/developmental assignments" went to white males, 2% to females, and 0% were awarded to minority employees. Ex.57 at L1314.

"Diversity Report Cards" for GPC (dated September 1999) and SoCo (dated August 1999), reported the following

racial disparities in compensation and workforce composition: a "glass ceiling effect" on African-American representation at all levels of SoCo management;[7] a "glass wall effect" in "minority leadership by function," Ex.86 at L373; a substantial racial disparity in the average pay of exempt employees at SoCo, *id.* at L364, L374; substantial racial disparities in the average salaries of employees in both exempt and non-exempt jobs at GPC and SCS, *id.* at L341-42, L352-53; and a substantial racial disparity in the distribution of annual PPP incentive bonuses. *Id.* ay [sic] L364, L371.

Dr. Janice Madden, a labor economist, analyzed workforce data supplied by SoCo and prepared an expert report that confirms the statistical significance of the racial disparities reflected in SoCo's internal reports. *See* DE119, Ex.1; DE141, Ex.B. Using a "multiple pools model" and multi-regression analyses to compare the promotion rates of employees in the same salary grade, subsidiary, and year, Dr. Madden found "statistically significant shortfalls in the numbers of promotions awarded to African-American employees, when compared to Caucasian employees . . . for 1996 through 1999." *Id.* at 5. Dr. Madden further analyzed the data, controlling for education level, experience (measured by both tenure at SoCo and years since completing education), and job function[8] at hiring (or in 1995 if hired before 1995). *See* DE119, Ex.1 at 12-15; DE141, Ex.B at 2-6. The results of these regression

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[7] Ex.86 at L372, L364 (17.4% of workforce is African-American, compared to 7.4% of "officials & managers").

[8] Dr. Madden derived job function descriptions (such as accounting, customer services, engineering services, generation, human resources, marketing, security) from SoCo's database. DE141, Ex.B at App.A.

analyses "show increases in both the coefficient and the statistical significance of estimated racial disparities in promotions when credentials (experience, education and job function) were added to the model," leading Dr. Madden to "conclude that African-Americans are at least as qualified [or "more qualified"] for promotion as Caucasians in the same salary grade, subsidiary, and year." *Id.* at 5. "The racial differential in promotions for the entire period," Dr. Madden calculated, "is 7.07 standard deviations beyond no difference (or zero). The probability that this racial difference could have occurred by chance is less than 26 in ten trillion."[9] *Id.*

Dr. Madden's multi-regression analyses of SoCo's data further revealed that "African-American employees have statistically significant lower compensation than Caucasians during the period 1995-1999." *Id.* at 9; *see* DE119, Ex.1 at 15-20; DE141, Ex.B at 6-9. "African-Americans receive 2.56% to 3.52% less than Caucasian employees in the same salary grade and subsidiary with the same time since completing schooling, tenure at Southern, level of education and job function." *Id.* at 9. Dr. Madden

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[9] Dr. Madden measured the standard deviation for each year as follows: 1996 = 3.75; 1997 = 1.72; 1998 = 3.71; 1999 = 4.25. DE141, Ex.B at Table R4'. The Supreme Court has long approved standard deviation calculations as a "precise method of measuring the significance of . . . statistical disparities" based on race. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977). The Court has recognized that "as a general rule for such large samples, if the difference between the expected value [*i.e.*, the expected number of African-Americans promoted] and the observed number [*i.e.*, the actual number of African-Americans promoted] is greater than two or three standard deviations, then the hypothesis that [employees] were [promoted] without regard to race would be suspect." *Id.* (internal citation omitted).

further calculated that once "the effects of the racially differentiated salary grades are removed, the salary disadvantage of African-Americans grows to a range of 13.17% to 14.33%." *Id.* In each year, Dr. Madden found, "the statistical significance of the race differences in compensation, after considering the effects of any racial differences in subsidiary, education, work experience, job function, and salary grade . . . strongly rejects the possibility that they could have been generated by chance." *Id.* at 7. Dr. Madden determined that "the overall pattern of lower compensation for African-Americans . . . is at levels well beyond those required to dismiss random variation," and that the results of her analyses "are consistent with racial discrimination." *Id.* at 8.

Plaintiffs offered evidence that the pattern of racial disparities in promotions and compensation at SoCo is nothing new. In a compliance review of GPC's operations covering the period November 1991 to July 1994, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) found numerous EEO violations in awarding promotions and compensation to minority employees of SoCo's largest subsidiary, including: salary disparities between minorities and non-minorities in similar positions; deviations from job posting procedures to the disadvantage of minority employees; "numerous examples . . . of non-minorities . . . selected for promotion with less or equal qualification than the minority . . . applicants"; failure to ensure minorities "receive career progression moves comparable to non-minorities"; and

underrepresentation of minorities in key areas, including management. DE119, Ex.14 at 3-7.[10]

Plaintiffs also submitted the following evidence of racial animus at SoCo facilities: photographs and documentary proof, generated in 2000, of at least 13 nooses displayed in eight GPC plants, some over a period of years, DE119, Ex.3-5; a compendium of racially offensive "jokes" posted on bulletin boards in company facilities, Ex.6; a "KKK cartoon" placed in employee mailboxes, Ex.7; a photograph of a hat with a racial epithet worn in the workplace, Ex.8; and testimonial accounts by numerous black employees of racially offensive slurs, "jokes," epithets, and harassment at work. Ex.11. Finally, 111 prospective class members signed affidavits recounting instances of alleged racial discrimination during their employment at SoCo. *See* DE120.

The district court denied class certification on October 11, 2001. Despite finding that SoCo subsidiaries "utilize common compensation and promotions policies promulgated and administered by . . . SCS," 205 FRD at 600, the court concluded that plaintiffs' systemic claims that these common policies have fostered a pattern or practice of racially disparate treatment or adverse impact do not raise questions of law or fact common to the class. *Id.* at 626. The court further found that none of the named plaintiffs, each of whom claims a denial of pay or promotional opportunities

[10] In 1994, GPC and OFCCP negotiated a conciliation agreement to resolve these violations. Following GPC's final report under the agreement, OFCCP informed SoCo in 1997 that "[t]he placement results for protected groups, particularly minorities and minority females, into [mid-level manager to executive level] positions over the two-year reporting period was poor." DE119, Ex.17.

pursuant to these policies, has "claims typical of the class as a whole." *Id.* at 610. There was no dispute that the proposed class met Rule 23(a)'s numerosity requirement, *id.* at 608, and the court found plaintiffs' "counsel are capable and experienced lawyers who would more than adequately represent the class." *Id.* at 627.

The court also decided that "this case cannot be certified under Rule 23(b)(2)," because plaintiffs' requests for compensatory and punitive damages would entail "highly individualized fact findings" that were not "merely incidental to an injunction or declaration in the class's favor." *Id.* at 627. The court never addressed plaintiffs' alternative request to certify a class under Rule 23(b)(2) solely to determine SoCo's liability for a pattern or practice of disparate treatment or adverse impact against African-Americans in promotions and compensation, and to award appropriate class-wide declaratory, injunctive, and equitable relief.

On March 31, 2003, the court issued seven opinions granting summary judgment against the claims advanced by each named plaintiff. *See Cooper v. Southern Company*, 2003 WL 1889268 (N.D. Ga., Mar. 31, 2003) (Edwards); 2003 WL 1889273 (S.J. Harris); 2003 WL 1889274 (P. Harris); 2003 WL 1889275 (McCullers); 2003 WL 1889282 (Green); 2003 WL 1889283 (Wilson); 2003 WL 1957484 (Cooper).[11] In resolving the individual claims, the court included virtually identical text in each opinion rejecting plaintiffs' claims that SoCo's policies and practices for

[11] Official citations to the court's summary judgment opinions are not yet available. For ease of reference, citations to each opinion will reference the name of the plaintiff whose claims are resolved and the WestLaw page number.

awarding promotions to and compensation for non-CBA positions have fostered a pattern or practice of race-based disparate treatment by individual managers, *see Edwards* at *13-*14; *S.J. Harris* at *10-*11; *P. Harris* at *7; *McCullers* at *6-*7; *Green* at *10-*11; *Wilson* at *12; *Cooper* at *14, or resulted in an adverse disparate impact against black employees. *See Edwards* at *14-15; *McCullers* at *8-*9; *Green* at *11-*12; *Wilson* at *12-*13.

The court included two paragraphs in each opinion that referenced only plaintiffs' statistical evidence and SoCo's "internal personnel documents," and rejected plaintiffs' pattern-or-practice claims of racially disparate treatment under SoCo's promotion and compensation policies. *See, e.g., McCullers* at *6-*7. Without mentioning the additional evidence plaintiffs submitted to support their pattern-or-practice claims (*i.e.*, proof of nooses and racial hostility in various SoCo facilities; OFCCP findings of racial disparities in promotions and compensation at GPC during the early 1990s; anecdotal evidence of 111 SoCo employees recounting specific incidents of racial discrimination and harassment), the court summarily concluded that each plaintiff "failed to come forward with evidence sufficient to prove that intentional discrimination was [SoCo's] 'standard operating procedure,'" and granted summary judgment against plaintiffs' pattern-or-practice claim. *Id.* (internal citation omitted). The court further ruled that each plaintiff "failed to establish that manager discretion in compensation and promotion decisions caused a statistically significant disparity" adverse to African-Americans, and granted summary judgment against plaintiffs' disparate impact claims. *Id.* at *8.

SUMMARY OF ARGUMENT

The district court abused its discretion by effectively deciding the merits of plaintiffs' claims of systemic race discrimination in the guise of denying class certification. The court further erred in holding plaintiffs' evidence insufficient for a jury to find that SoCo's common policies of committing pay and promotion decisions to the unmonitored discretion of individual managers have fostered a pattern or practice of disparate treatment, or caused an adverse disparate impact, against African-Americans. Viewed under the appropriate legal standards established in Supreme Court precedent, plaintiffs plainly satisfy the prerequisites of Rule 23(a) and have presented evidence sufficient to warrant a trial on their systemic discrimination claims. Plaintiffs' request to certify a class solely to determine SoCo's liability for systemic discrimination and award appropriate declaratory, injunctive, and equitable relief – an alternative the district court did not even address – is precisely the type of action contemplated for class treatment under Rule 23(b)(2). This Court should therefore reverse the summary judgment for SoCo and the denial of class certification, and direct the court on remand to certify a class under Rule 23(b)(2) to litigate at trial the questions of whether SoCo's pay and promotion policies foster a pattern-or-practice of disparate treatment, or an adverse disparate impact, against African-Americans, and, if appropriate, to award declaratory, injunctive, and equitable relief.

ARGUMENT

PLAINTIFFS SATISFY ALL REQUIREMENTS OF RULE 23(b)(2) TO LITIGATE CLASS CLAIMS OF SYSTEMIC RACE DISCRIMINATION IN PAY AND PROMOTIONS AT SOUTHERN COMPANY, AND HAVE PRODUCED SUFFICIENT EVIDENCE TO TRY THEIR PATTERN-OR-PRACTICE AND DISPARATE IMPACT CLAIMS TO A JURY.

The district court abused its discretion in refusing to certify a class pursuant to Rule 23(b)(2), and erred in granting summary judgment against plaintiffs' claims of systemic race discrimination. These rulings betray this Court's longstanding "conviction that Title VII and the class action rule should be construed so as to further the strong public policy of eradicating all vestiges of racial discrimination in employment." *Holmes v. Continental Can Co.*, 206 F.2d 1144, 1152 (11th Cir. 1983).

The Supreme Court in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 n.9 (1984), explained that

> [t]he crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision-making.

Id. at 867. A policy or practice of committing employment decisions to the subjective discretion of individual managers or supervisors may be challenged under Title VII as fostering a pattern or practice of disparate treatment,

Hazelwood School Dist. v. United States, 433 U.S. 299, 301-02 (1977) (challenging pattern or practice of intentional racial discrimination in "relatively unstructured procedures for hiring teachers" that delegated to "each school principal . . . virtually unlimited discretion . . . to hire the 'most competent' person available"), or resulting in an unjustified disparate impact. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 978, 992 (1988) ("subjective or discretionary employment practices may be analyzed under the disparate impact approach").

"The commonality and typicality requirements of Rule 23(a) tend to merge" because

> [b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. These requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

General Telephone v. Falcon, 457 U.S. 147, 157 n.13 (1982). Here, these three requirements are plainly met. Plaintiffs' pattern-or-practice and disparate impact claims raise questions of law and fact common to every African-American employee whose compensation and opportunities for advancement may be limited under SoCo's common system of delegating to individual managers virtually complete discretion to make pay and promotion decisions for employees in non-CBA jobs. The resolution of plaintiffs'

claims of systemic discrimination rests on the same evidence and identical legal precedent. *See Nelson v. United Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983) (*Falcon* requires plaintiff to show "proof or legal arguments involved in her claims and class claims would be overlapping so that . . . class suit would advance Rule 23's goal of judicial economy"). Ironically, the district court in effect acknowledged the commonality of the legal and factual questions raised by plaintiffs' pattern-or-practice and disparate impact claims by including virtually identical passages in each summary judgment opinion to resolve them.

Furthermore, the individual claims of each named plaintiff that s/he was denied a promotion or compensation because of race pursuant to SoCo's common policies are typical of the claims of absent class members who were discriminatorily denied promotions or compensation under the same policies. In finding that individual plaintiffs' claims were typical only of portions of the class (*i.e.*, employees holding positions at his/her grade level, or in the same non-exempt or exempt status), and that none of the named plaintiffs raised claims typical of management-level employees, 205 FRD at 610, the court disregarded undisputed evidence (and its own findings, *id.* at 600) that the same policies and practices under which each plaintiff claims s/he was denied promotion to a non-CBA job, or received a lower salary or bonus in such a job, apply to all promotion and compensation decisions for non-CBA jobs at every grade level, whether exempt or non-exempt.

Finally, every class member shares with named plaintiffs the same interest in establishing whether SoCo's common pay and promotion policies foster systemic racial discrimination and, if so, in securing declaratory and

injunctive relief to eliminate the discriminatory practices and ensure equal opportunity in the areas of compensation and advancement. Because the named plaintiffs have every incentive to litigate vigorously the systemic discrimination claims, and have retained able and experienced counsel, they have demonstrated their adequacy as class representatives. Plaintiffs thus satisfy all four prerequisites of Rule 23(a).

Plaintiffs' request to certify a class solely to determine SoCo's liability for systemic discrimination and award appropriate declaratory, injunctive, and equitable relief – an alternative the district court did not even address – is precisely the type of claim contemplated for class treatment under Rule 23(b)(2).[12] "The Advisory Committee Note cited cases enjoining violations of civil rights as 'illustrative' of the types of cases properly cognizable under subsection (b)(2), ... as did the reporter of the rules revision committee in his personal commentary on the 1966 amendments" to Rule 23. *Holmes*, 706 F.2d at 1155. The sole basis for the district court's denial of certification under Rule 23(b) was the predominance of individualized determinations required to resolve individual class members'

[12] Under this proposal, the class claims of systemic discrimination (*i.e.*, pattern-or-practice and disparate impact), and the individual claims of the seven named plaintiffs, would be resolved in this action. A judgment of liability on either systemic claim would require an award of class-wide declaratory and injunctive relief, and entitle absent class members to litigate separately their individual claims that they were denied promotions or compensation pursuant to SoCo's discriminatory policies. The district court acknowledged "controlling precedent" holding that "back pay is considered equitable relief and therefore can be awarded to class members in a case certified under Rule 23(b)(2)." 205 FRD at 627 (citing *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974)).

claims for monetary damages. Because plaintiffs' alternative suggestion to certify only the claims for class-wide declaratory, injunctive, and equitable relief eliminates entirely this concern, this Court should reverse and remand with directions to certify plaintiffs' claims of systemic discrimination to determine liability and appropriate declaratory, injunctive, and equitable relief. *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 172 (2d Cir. 2001) (vacating dismissal of Title VII systemic racial discrimination suit challenging company-wide policy of delegating to department supervisors discretionary authority to make discipline and promotion decisions, and directing district court to certify plaintiffs' disparate impact claim and, at a minimum, the liability stage of plaintiffs' pattern-or-practice claim under Rule 23(b)(2)), *cert. denied*, 535 U.S. 951 (2002).

The district court abused its discretion by effectively deciding the merits of plaintiffs' pattern-or-practice and disparate impact claims – without a hearing, let alone a jury trial – in the guise of denying class certification. While "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," *Falcon*, 457 U.S. at 160 (internal citations omitted), the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974), found "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Although a plaintiff seeking certification is "obligated to show, in at least a preliminary fashion, the required commonality between her claims and those of the putative class," her "'burden of proof to demonstrate the

existence of this common question entails . . . less than a prima facie showing of liability.'" *Nelson*, 709 F.2d at 680 (citations omitted).

The court in this case plainly violated these principles. In addressing Rule 23(a)'s commonality requirement, the court discussed at length "the relative strength and quality" of evidence supporting plaintiffs' systemic discrimination claims, 205 FRD at 610, and its opinion is replete with judgments on the weight and probative value of plaintiffs' evidence that are within the sole province of the jury. The opinion denying class certification thus demonstrates a clear abuse of discretion in applying Rule 23, and exposes the court's error in granting summary judgment against plaintiffs' systemic claims.

With respect to plaintiffs' statistical evidence, for instance, the court concluded that while the "methodologies" of plaintiffs' expert "may be valid, the analysis has some limitations which undermine its usefulness in measuring whether [SoCo's] employment practices are racially neutral." *Id.* at 613. At the same time, the court rejected some arguments and analysis advanced by SoCo's expert, Dr. Joan Haworth, to counter plaintiffs' statistical proof. For instance, the court rejected SoCo's argument that Dr. Madden improperly lumped together progressive and competitive promotions "because both types of promotions involve evaluative choices by management." *Id.* at 614. Further, while Dr. Haworth's analysis of salary and promotion data included many more variables and concluded that "small gaps" in the promotion rates and compensation of black and white employees "were not statistically meaningful," *id.*, the court found "some truth" in Dr. Madden's response "that the lack of statistical significance was due to the fact that Haworth had 'carved

up' the employees into pools so small that it would be unlikely that the results would be statistically significant." *Id.* In addition, the court found Dr. Haworth's omission of "the so-called 'developmental moves'" from her analysis of promotions "is a factor limiting the usefulness of [her] report to the extent it is intended to prove that [SoCo's] treatment of African-Americans is the same." *Id.* Having reviewed both experts' reports, the court was "left with the impression that there could be some salary gap and promotions gap between African-American and white employees," but found it "impossible to determine what the gaps are, whether they are statistically significant, or whether factors other than race are involved." *Id.* at 614-15.

The Supreme Court's decision in *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), establishes that the district court's "view of the evidentiary value of [plaintiffs'] regression analysis was plainly incorrect." The court's primary criticism of plaintiffs' statistical evidence was a perceived "failure to adequately measure the promotion and compensation experiences of similarly situated employees." 205 FRD at 613. Although Dr. Madden's multi-regression analyses controlled for year, subsidiary, job grade, level of education, years since completing school (as a proxy for time in the labor force), tenure at SoCo, and job function when hired (or in 1995), the court faulted her failure to control for "specific job categories and job progressions," while conceding "it would be very difficult to factor those considerations into a statistical analysis." *Id.* at 614. Having concluded that Dr. Madden did not adequately "account for differences in the type or level of the employees' applied skills," *see McCullers*, 2003 WL 1889275 at *6-*8, the court refused to consider plaintiffs' statistics

"evidence of a pattern and practice of discrimination." 205 FRD at 615.

As in this case, plaintiffs in *Bazemore* claimed systemic race discrimination in compensation and "relied heavily on multiple regression analyses designed to demonstrate that blacks were paid less than similarly situated whites." 478 U.S. at 398. The Supreme Court held a lower court "erred in stating that [plaintiffs'] regression analyses were 'unacceptable as evidence of discrimination,' because they did not include 'all measurable variables thought to have an effect on salary level.' . . . While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be," the Court explained, "it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'" *Id.* at 400. "Normally, failure to include variables will affect the analysis' probativeness, not its admissibility," unless the regression is "so incomplete as to be inadmissible," an argument SoCo never made. *Id.* & note 10. The Court further emphasized,

> Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. . . . Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the [factfinder] may fairly conclude, in light of all the evidence, that it

> is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

Id. at 400-01. The credibility of the parties' experts, and the weight and probative value of their statistical analyses, is for the jury to decide, and plaintiffs' evidence exceeds the legal standards for submission to a jury. *See VisaCheck/Mastermoney Litigation*, 280 F.3d 124, 135 (2d Cir. 2001) ("a district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts" in resolving Rule 23 motion).

The district court similarly usurped the jury's function in evaluating plaintiffs' additional evidence of systemic discrimination at SoCo. In finding plaintiffs' evidence of racial animus in SoCo facilities insufficient to establish the commonality required by Rule 23(a), the court improperly discounted the probative value of this evidence to permit an inference of discriminatory motive and to demonstrate managerial indifference to the rights of black employees. The court reviewed documentary, photographic, and testimonial evidence that "at numerous times at various locations knotted rope was present which resembled a noose," and acknowledged that "[t]hese 'nooses' did offend and intimidate some employees, who attributed a racial significance to the nooses." 205 FRD at 615. Citing the "sworn statements of [SoCo] employees [who] . . . disavowed any knowledge of racial meaning or racial animus," *id.*, and "voluminous" memoranda prepared by SoCo during investigations conducted shortly after this lawsuit was filed, *id.* at 615-18, however, the court found it "impossible to say whether *any* of the nooses were made or displayed out of a desire to offend or intimidate African-American employees." *Id.* at 618.

The court also reviewed sworn accounts of "various racial slurs, epithets, jokes, and harassment" in nearly all of the 111 affidavits submitted by prospective class members, and found "the conduct referenced therein are [sic] unacceptable and . . . demeaning to African-Americans." *Id.* at 619. While such evidence of racial hostility is relevant "to determine the existence of a pattern and practice of discrimination," *id.* at note 39, the court improperly discounted its probative value "given the size of [SoCo's] workforce (over 12,000 employees) and the large number of work locations," and therefore concluded that "the noose evidence and evidence of racial slurs, jokes and epithets . . . are inadequate to establish the existence of a pattern and practice of discrimination." *Id.* (footnote omitted).

The court used a similarly inappropriate rationale to reject the anecdotal evidence of discrimination submitted by 111 prospective class members "who recite (in addition to the noose testimony and the racial jokes and slur testimony . . .) their [unsuccessful] efforts to obtain promotions or greater compensation, and their belief that [SoCo has] discriminated against them" based on race. *Id.* at 620. The court remarked that "resolving the validity" of these allegations "would be a fact-intensive process," *id.* at 624, and observed that "111 affiants out of a group of 2400 individuals is too low a proportion to prove a pattern and practice of discrimination." *Id.* at 624.

The district court's treatment of the non-statistical evidence reflects a fundamental misunderstanding of the purpose such evidence serves in proving systemic discrimination. In deciding an employer's liability for systemic discrimination, "the focus is on the broad pattern or practice at issue, not the merits of individual claims." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1556 (11th

Cir. 1986). The function of offering the testimony of individual employees "about their personal experiences with the company" is to bring the "cold numbers" provided by a statistical analysis "convincingly to life," not to establish an employer's liability for individual claims of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *Kilgo v. Bowman Tansp.* [sic] *Co.*, 789 F.2d 859, 874 (11th Cir. 1986) Plaintiffs' anecdotal evidence far exceeds the quantity submitted in *Teamsters*, where the government introduced testimony "recount[ing] over 40 specific instances of discrimination." *Id.* at 338. The credibility of the testimony offered by these employees, and the weight to be accorded the other evidence of racial hostility at SoCo, are for the jury to resolve at trial, not for the district court to determine at summary judgment, much less on a motion for class certification.

Similarly, the court's failure to grasp the probative significance of uncontested evidence showing a "significantly smaller representation of African-Americans in lower, middle and upper management than exists at non-management levels" at SoCo, 205 FRD at 619, reflects a profound misconception of the law governing statistical proof of systemic discrimination. "[T]his data," the court ruled, "does not in itself show an intent to discriminate." *Id.* The Supreme Court has held otherwise. "Statistics showing racial or ethnic imbalance" in an employer's workforce "are probative in a case such as this one," the Court explained, "because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory [promotion] practices will in time result in [managerial or supervisory ranks] more or less representative of the racial and ethnic composition" of the workforce from which

this staff is promoted. *See Teamsters*, 431 U.S. at 340 n.20 (absent discrimination, hiring practices should be expected to produce a workforce that mirrors the general population).

The court further erred in discounting the probative value of SoCo's documented lack of progress in rectifying racial disparities in pay and promotions, identified by OFCCP, to show "the indifference of [SoCo's] senior management to race discrimination." 205 FRD at 625. Evidence that "changes implemented" under the OFCCP conciliation agreement "did not . . . [close] the salary and promotion gap between Caucasians and African-Americans," and that SoCo's "own self-study ('The Diversity Report Card') was critical of the extent of improvement," the court decided, did not show "the indifference of senior management is at such a level" to support plaintiffs' systemic claims. *Id.* Once again, the district court's view conflicts with Supreme Court precedent. The Court in *Bazemore* considered proof of an employer's history of "salary discrimination, and . . . ineffectual attempts to eradicate it," part of "an impressive array of evidence to support [plaintiffs'] contention that [defendant] engaged in a pattern or practice of discrimination with respect to salaries." 478 U.S. at 401.

Finally, the district court criticized plaintiffs' reliance on Staffing Director Wolf's testimony to show that SoCo's policy permits individual managers, in their discretion, to ignore "numerous, detailed written policies and procedures pertaining to filling job vacancies, making promotions, and determining compensation levels." 205 FRD at 619-20. In the court's view, "Wolf's testimony is more fairly characterized as asserting lack of knowledge," and a "fairer interpretation of the evidence would be that [SoCo has]

numerous written procedures and policies . . . , that there is some variation in the manner in which various managers use these procedures, and that the policies and procedures were never intended (nor could they be) to dictate particular outcomes in individual cases." *Id.* at 620.

It was not the court's role, however, to decide on the "fairest" interpretation of Wolf's (or any other witness's) testimony. Such determinations are a quintessential jury function. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). While a jury might regard the evidence as the district court did, this is certainly not the only permissible view of the record, and certainly not the view most favorable to plaintiffs, as required to sustain summary judgment for SoCo. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

In holding plaintiffs' evidence of systemic discrimination insufficient to go to trial, the district court ignored Supreme Court precedent and imposed a legally unattainable standard to challenge, pursuant to *Hazelwood* and *Watson*, systemic discrimination arising from a policy of affording individual managers unmonitored discretion to engage in subjective decisionmaking.

CONCLUSION

The EEOC urges this Court to reverse the denial of class certification and entry of summary judgment, and direct the court on remand to certify a class under Rule 23(b)(2) to litigate at trial the questions of whether SoCo's pay and promotion policies foster a pattern-or-practice of

disparate treatment, or an adverse disparate impact, against African-Americans, and, if appropriate, to award declaratory, injunctive, and equitable relief.

Respectfully submitted,

_____/s/_____
DORI K. BERNSTEIN, Attorney
NICHOLAS M. INZEO,
Acting Deputy General Counsel
PHILIP B. SKLOVER,
Associate General Counsel
CAROLYN L. WHEELER,
Assistant General Counsel
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed.R.App.P. 32(a)(7)(B), and the length authorized for briefs as amicus curiae by Fed.R.App.P. 29(d). This brief contains 6,993 words.

_____/s/_____
Dori K. Bernstein, Attorney

CERTIFICATE OF SERVICE

I hereby certify that two copies of this brief were mailed, first class, postage prepaid, on this 13th day of June, to the following:

Michael B. Terry
Joshua F. Thorpe
Steven J. Rosenwasser
Bondurant, Mixson
& Elmore, LLP
3900 One Atlantic Center
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309-3417

W. Ray Persons
King & Spaulding
191 Peachtree Street, N.E.
Atlanta, Georgia 30303-1763

Walter Christopher Arbery
Hunton & Williams
600 Peachtree Street, N.E.
Bank of America Plaza,
Suite 4100
Atlanta, Georgia 30308-2216

Johnnie L. Cochran, Jr.
J. Keith Givens
Hezekiah Sistrunk, Jr.
Cochran, Cherry, Givens,
Smith & Sistrunk, P.C.
Suite 800 The Candler Bldg
127 Peachtree Street
Atlanta, Georgia 30303

Stephen William Riddell
Troutman Sanders
Bank of America Plaza
600 Peachtree Street, N.E.
Suite 5200
Atlanta, Georgia 30308-2216

_____/s/_____
Dori K. Bernstein
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
1801 L Street, N.W., Room 7046
Washington, DC 20507
(202)663-4734

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

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42 U.S.C.S. § 2000e-2(m)

Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 U.S.C.S. §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

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42 U.S.C. § 2000e-5(g)(2)

Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 U.S.C.S. § 2000e-3(a)].

(B) On a claim in which an individual proves a violation under section 703(m) [42 U.S.C.S. § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) § 42 U.S.C.S. § 2000e-2(m)]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).